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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1986

No:

VIVIENNE RABIDUE,

Petitioner

v

OSCEOLA REFINING COMPANY,
A division of Texas-American
Petrochemicals, Inc.,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OF RECORD:

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131PP

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. Whether a work environment that permits obscene comments about women, including the use of such terms as "cunt," "pussy," "tits," and "fat ass," and in which pictures of nude or partially clad women are displayed in work or office areas constitutes a hostile or offensive work environment under the applicable federal and state standards of sex discrimination and sexual harassment?

2. Whether women alleging hostile work environment claims under Title VII of the Civil Rights Acts must prove that the sexually explicit language, harassment and other conduct complained of would interfere with work performance and seriously affect the psychological well-being of a "reasonable person?"

3. Whether any applicable "reasonable person" standard varies depending on such factors as the personality of the plaintiff, the prevailing work environment, and the prevalence of written and pictorial erotica in American society?

4. Whether sex discrimination complaints brought under state civil rights laws which parallel the protections of Title VII are subject to dismissal for failure to meet the federal "reasonable person" standard, and corporate successorship doctrine, where controlling state court interpretation of those issues would entitle the plaintiff to relief?

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STATUTES AND REGULATIONS

The petitioner Vivienne Rabidue respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 13, 1986.

OPINIONS BELOW

The opinion of the Hon. Stewart Newblatt, United States District Court for the Eastern District of Michigan, Southern Division, which was entered on April 18, 1984, is reported at 584 F.Supp. 419 (ED Mich, 1984), and is attached to this Petition as Exhibit A. The opinion of the Hon. Robert P. Krupansky and Hon. H. Ted Milburn for the Sixth Circuit Court of Appeals, with the dissenting opinion of the Hon. Damon J. Keith, which was entered on November 13, 1986 (No: 84-1362) and is as yet unreported, is attached to this Petition as Exhibit B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered November 13, 1986, and a timely petition for certiorari was filed within 90 days of that date in accordance with 28 U.S.C. §2101(c). This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

Title VII of the Civil Rights Act of 1964, Pub.L. 88-352, 42 U.S.C. §2000e-2(a) provides in relevant part:

"(a) It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2.

The Elliott-Larsen Civil Rights Act of the state of Michigan, P.A. 1976, No. 453 as amended, M.C.L.A. 37.2102, provides in relevant part:

"(1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of

public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, or marital status as prohibited by this act, is recognized and declared to be a civil right.

(2) This section shall not be construed to prevent an individual from bringing or continuing an action arising out of sex discrimination before July 18, 1980 which action is based on conduct similar to or identical to harassment."

M.C.L.A. 37.2103(h)(i-iii), provides in relevant part as follows:

"(h) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

(i) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.

(ii) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's employment, public accommodations or public services, education, or housing.

(iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment."

M.C.L.A. 37.2202(1)(a) provides in relevant part:

"(1) An employer shall not:

(a) Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status."

The EEOC Guidelines on Sexual Harassment, 29 CFR §1604.11(a)(3) provides in relevant part:

"Harassment ~~on the~~ basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made

either explicitly or inexplicitly a term or condition of an individual's employment,

(2) submission to a rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or

(3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

The EEOC Guidelines on Sexual Harassment, 29 CFR §1604.11(d) provides in relevant part:

"With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct,

unless it can show that it took immediate and appropriate action."

STATEMENT OF THE CASE

Petitioner Vivienne Rabidue was the only woman holding a salaried management position at Osceola Refining Company in West Branch, Michigan, when she was discharged in February, 1977, at the age of fifty-seven. Plaintiff was hired as an executive secretary in 1970, then received promotions which involved increased responsibilities and managerial duties. At various times, she held the job titles and duties of administrative assistant to the company president, office manager, credit manager, and sales coordinator. During this period, Osceola was acquired first by United Refineries of Pennsylvania in 1974, then by respondent Texas-American Petrochemicals in September, 1976.

After plaintiff's discharge, in March, 1977, formal charges of sex discrimination were filed with the Michigan Department of Civil Rights and the federal Equal Employment Opportunity Commission. Prior to that time, petitioner's documententation of discriminatory treatment of herself and other female workers at Osceola included a series of memorandae which remained in her personnel file during the successive corporate takeovers.

Following receipt of an EEOC right to sue letter, in May, 1979 Vivienne Rabidue filed this lawsuit in United States District Court for the Eastern District of Michigan. Federal jurisdiction in the court of first instance was based upon Title VII of the Civil Rights Acts, 42 U.S.C. §2000e-2 and 42 U.S.C. §2000e-5(f)(3), and the Equal Pay Act, 29 U.S.C.

§206(d)(1). The Complaint included a pendent state sex discrimination claim under Michigan's Elliott-Larsen Civil Rights Act, M.C.L.A. 37.2101.

A five-day bench trial held before the Hon. Stewart Newblatt resulted in dismissal of all causes of action. The District Court's opinion found that use of the words "cunt," "pussy," "tits," "whore," "bitch," and "fat ass" with reference to plaintiff and other females in Osceola's office environment, and the posting of sexually explicit posters on the walls of work areas did not constitute sexual harassment, and therefore, did not create a cause of action for sex discrimination under applicable state and federal law. Rabidue v. Osceola Refining, 584 F.Supp. 419 (ED Mich, 1984) at 423, 432-433. (Appendix A at A5-A6, A35-A41).

The District Court held that although the defendant corporation indeed "knew about" the obscene language and poster displays and did not rectify the situation, nonetheless petitioner's trial proofs were insufficient to meet the Court's definition of unlawful sex harassment because it did not render the work environment "offensive", nor "substantially interfere" with Mrs. Rabidue's employment. The District Court also found that the successorship doctrine established in Wiggins v. Spector Freight System, Inc., 583 F.2d 882 (CA 6, 1978) and EEOC v. McMillan Bloedel, 503 F.2d 1086 (CA 6, 1974) exonerated defendant from liability for acts of sex discrimination and sex harassment which occurred prior to the acquisition of Osceola Refining by defendant, despite the documentation of complaints regarding sex

discrimination which plaintiff placed in her personnel file, and despite plaintiff's efforts to personally inform the president of Texas-American of the discrimination prior to her discharge. Rabidue v. Osceola Refining, 584 F.Supp. 419 (ED Mich, 1984) at 431, 433-435, and 424. (Appendix A at A30-A31, A35-A41, A9-A12.)

On appeal, the Sixth Circuit affirmed, Judge Damon Keith dissenting. The majority opinion of Circuit Judges Krupansky and Milburn concluded that the trial court had "aptly" applied the test for hostile environment sexual harassment cases, "in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema and in other public places."

Rabidue v. Osceola Refining, _____ F.2d_____, 6th Cir. #84-1362 at 15 and 17. (Appendix B at 15 and 17.)

Judge Keith's dissent maintained that the misogynous conditions did substantiate anti-female animus, and that the standard used in this case "shields and condones behavior Title VII would have the courts redress," in light of this Court's decision in Meritor Savings Bank v. Vinson, ____U.S.____, 106 S.Ct. 2399 (1986). Rabidue v. Osceola Refining, ____F.2d____, 6th Cir. #84-1362 at 22 and 29. (Appendix B at 22 and 29).

ARGUMENT

There are special and important reasons why this Court should review and clarify the standard that federal trial level judges apply to hostile work environment sex harassment cases, as the record in this proceeding vividly illustrates.

First, the U.S. District Court opinion termed this relatively new Title VII theory of liability "controversial and extremely important," and described how application of the test utilized in this case, "opens the door to an important conceptual development of the sex harassment theory." Rabidue v. Osceola Refining, 584 F.Supp. 419 (ED Mich, 1984) at 427 and 430. (Appendix A at A22, A27). Yet as soon as the courts below declared that the door was being opened, they abruptly slammed it shut. This case holds

that statutes and EEOC guidelines are not violated when such anti-female obscenities as "whores," "cunt," "pussy," "tits" and "fat ass" are directed towards female workers by their male peers, posters depicting female nudity are displayed, and an office desk placque poignantly declares, "Even male chauvinist pigs need love." Meanwhile, a male fellow employee declared about plaintiff, "All that bitch needs is a good lay." Plaintiff was also being discriminatorily denied such privileges as credit cards, free gasoline, entertainment privileges, and taking (male) customers to lunch. Rabidue v. Osceola Refining, ____F.2d____, 6th Cir. #84-1362 at 21, 22. (Appendix B, at 21, 22). Such an environment is declared by the courts below not to be unlawfully "offensive" to a "reasonable person" in this day and age. 584 F.Supp. at 433;

(Appendix A at A40-A41). #84-1362 at 14 and 21; (Appendix B at 14 and 21).

The statutory protections established by Title VII, the EEOC guidelines, and the state Elliott Larsen Act were clearly intended to expand the remedies against sex discrimination and sexual harassment. The guidelines and caselaw define hostile and offensive work environment as constituting sexual harassment without the necessity of proving quid pro quo sexual demands. The lower court discussed this as a "relatively recent" development. It is, therefore, particularly ironic that the courts below should find that modern female workers who have been provided this set of protections against offensive work environments cannot utilize them because societal standards of behavior have sunk so low that the use of such sexual terms is commonly accepted and no longer

"offensive." This Court should grant certiorari to emphasize that the course of these proceedings so far departed from the accepted and usual course of judicial factfinding and application of fact to law, as to call for an exercise of this Court's power of supervision.

Second, the District Court formulated this new standard of review for use in hostile environment cases by explicitly rejecting the Eleventh Circuit's analysis in Henson v. City of Dundee, 682 F.2d 897 (11th Cir, 1982). 584 F.Supp. at 433. The Henson analysis rejected by the courts below was discussed and cited with approval by the United States Supreme Court in Meritor Savings Bank v. Vinson, ____ U.S. ____, 106 S.Ct. 2399 (1986). The instant case also is in conflict with the test set forth by the District of Columbia Circuit in Bundy v. Jackson, 641 F.2d 934 (DC Cir,

1984). Bundy, too, was cited with approval in the Meritor decision. Although the majority opinion of the Sixth Circuit Court of Appeals sought to reconcile the result in this proceeding with the Henson and Bundy precedents, the instant decision actually does conflict with the 11th and District of Columbia Circuits' decisions on the same issues, thus meriting review by this Court.

Third, the majority opinion of the Sixth Circuit Court of Appeals in Rabidue v. Osceola decides an important question of federal law which has not been, but which should be, decided by this Court: the scope of employer liability arising from sexually hostile work environment claims, where a male peer's harassment rather than harassment by a superior is at issue. ____F.2d____, 6th Cir #84-1362, Fn 6 at 16. (Appendix B, Fn 6 at 16). Here, the

District Court expressly found the defendant employer "knew" of the foul language and dirty posters, but the company "was not successful in curbing it." 584 F.Supp. at 431 and 423. (Appendix A at A31, A5).

Judge Keith's dissenting opinion quoted the supervisor's actual trial testimony which described the only corrective actions taken as "a little fatherly advice" extended to the prime offender. 6th Cir #84-1362 at 22. (Appendix B at 22). In light of the unwillingness of the Sixth Circuit majority to apply Meritor, supra and find respondeat superior liability upon the foregoing facts, review by this Court to settle the legal principle at stake would be in order.

Fourth, both lower Court opinions resolve federal questions as to the scope

of Title VII in a way in conflict with Chief Justice Rehnquist's opinion, and the concurring opinion of Justice Marshall, in Meritor Savings Bank v. Vinson, supra. In that opinion, the court states:

> "In concluding that so-called 'hostile environment' (i.e. non quid pro quo) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult. Rogers v. EEOC, 454 F.2d 234 (CA 5, 1971), cert. denied, 406 U.S. 957 (1972), was apparently the first case to recognize a cause of action based upon a discriminatory work environment. In Rogers, the Court of Appeals for the Fifth Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer crated an offensive work environment for employees by giving discriminatory service to its Hispanic clientele." ____U.S.____, 106 S.Ct. 2399, at 2405 (1986). [citations omitted.]

Since Meritor recognized and approved the Rogers court's finding that an "offensive work environment" was established where customers were the targets of the discriminatory treatment, the courts below clearly erred in failing to recognize the offensive work environment established by the use of vulgar and sexual terms aimed directly toward plaintiff and other female Osceola employees.

Meritor goes on to cite and illuminate a passage from Rogers, supra, regarding hostile work environments:

> "[A]n employee's protection under Title VII extend[s] beyond the economic aspects of employment:
>
> > [T]he phrase 'terms, conditions or privileges of employment' in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working heavily charged with ethnic or racial discrimination ... One can

> readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers... 454 F.2d at 238.
>
> Courts applied this principle to harassment based on race. [citations omitted]. Nothing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." Meritor, supra, ____U.S.____, 106 S.Ct. at 2405 (emphasis in original).

The Court in Meritor agreed that, as established in Bundy and Henson, mere utterance of an ethnic or racial epithet is not sufficient to establish a Title VII violation. The evidence must show "pervasive harassment." Meritor, supra, ____U.S.____, 106 S.Ct. at 2406. As Judge Keith's dissent indicates, a review of the record revealed:

> "The overall circumstances of plaintiff's workplace evince an anti-female environment. For seven years plaintiff worked at Osceola as the

sole woman in a salaried management position. In common work areas plaintiff and other female employees were exposed daily to displays of nude or partially clad women belonging to a number of male employees at Osceola. One poster, which remained on the wall for eight years, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling 'Fore.'... Plaintiff testified the posters offended her and her female co-workers. In addition, Computer Division Supervisor Doug Henry regularly spewed anti-female obscenity. Henry routinely referred to women as 'whores,' 'cunt,' 'pussy' and 'tits.'... Plaintiff arranged at least one meeting of female employees to discuss Henry and repeatedly filed written complaints on behalf of herself and other female employees who feared losing their jobs if they complained directly. Osceola Vice President Charles Muetzel stated he knew that employees were 'greatly disturbed' by Henry's language. However, because Osceola needed Henry's computer expertise, Muetzel did not reprimand or fire Henry." Rabidue v. Osceola Refining, ___ F.2d ____, 6th Cir. #84-1362 at 21. (Appendix B at 21).

Because these facts cannot be reconciled with the principles established in Meritor, this Court should grant certiorari.

Fifth, the Michigan Supreme Court recently adopted the continuing violation approach to sex discrimination claims arising under the Elliott-Larsen Civil Rights Act in Sumner v. Goodyear, Knight v. Blue Cross-Blue Shield, and Robson v. General Motors (Docket Nos: 74523, 75109 and 75168, decided December 30, 1986). Unlike the federal Title VII model, Michigan's Civil Rights Act contains no requirement that a written administrative charge of discrimination be filed at all with the state Department of Civil Rights to commence or maintain a lawsuit. The wholesale adoption of the federal successorship doctrine fails to afford due respect to this important difference

between state and federal jurisdictional prerequisites, and decides a federal question in a way in conflict with the Michigan Supreme Court's interpretation of the continuing violation theory so as to justify review by this Court.

Also unlike the federal model, Michigan's Elliott Larsen Act provides for a right to jury trial in the state courts, and for the recovery of damages for mental distress in addition to wage loss claims. These important state remedies are threatened by the standard of judicial review set forth in the instant case, in which a court could impose its own peculiar notion of what is "offensive" or what was "annoying - but fairly insignificant" sex harassment in any plaintiff's workplace. Because the standard enunciated in this proceeding by its own terms applies to both Title VII

and state Elliott-Larsen Act substantive law, this novel construction of the EEOC guidelines decides an important federal question in a way that conflicts with longstanding decisions of a state court of last resort.

Finally, as Judge Keith's incisive dissenting opinion notes, the decision of the Sixth Circuit Court of Appeals decides important issues of federal law in such a manner as to create a clear double standard between the claims of sex discrimination plaintiffs and those of other victims of unlawful employment discrimination. Indeed, federal law does not and should not dispose of race discrimination charges by labeling the claimant "uppity," or expect Jews to tolerate some level of "kike" jokes because anti-Semitism "may abound."

Of what real relevance is "the educational background of plaintiff's co-workers and supervisors, the physical make up of the plaintiff's work area, and the reasonable expectation of the plaintiff with respect to the kind of conduct that constitutes sex harassment" in fashioning a "workable judicial standard"? It is noteworthy that although the District Court and Court of Appeals decisions both approve of such inquiries, absolutely no factfinding was made about any of those issues in Vivienne Rabidue's case, although she herself was labeled "a capable, independent, ambitious, aggressive, intractable, and opinionated individual..... In sum, the plaintiff was a troublesome employee." 6th Cir, #84-1362 at 3. (Appendix B at 3). At minimum, under the Sixth's Circuit's own standards, the instant case should have

been remanded for further factfinding on the standards which the Sixth Circuit finds applicable. More significantly, this view conflicts with the concurrence of Justice Marshall in Meritor, supra, which specifically warned against creating special rules for use in hostile environment cases that are not applied in other Title VII situations. Meritor Savings Bank v. Vinson, ____U.S.____, 106 S.Ct. at 2411.

There are special and important reasons why such a double standard, and such a departure from customary civil rights adjudication standards, should not be condoned in hostile environment sex harassment cases. As Judge Keith observed, "[U]nless the outlook of the reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of

reasonable behavior fashioned by the offenders, in this case, men." 6th Cir, #84-1362 at 26. (Appendix B at 26).

For these reasons, this Court's discretion and power of supervision should be exercised, and a writ of certiorari issue.

Respectfully submitted,

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February 9, 1987

STATE OF MICHIGAN)
)ss
COUNTY OF SAGINAW)

AFFIDAVIT OF SERVICE

I, BARBARA A. KLIMASZEWSKI, hereby certify that on this 9th day of February, 1987, three copies of the Petition for Writ of Certiorari were mailed postage prepaid, to Seth M. Lloyd, and M. Beth Sax, Dykema, Gossett, Spencer, Goodnow & Trigg, 35th Floor, 400 Renaissance Center, Detroit, Michigan 48243, counsel for the respondent herein. I further certify that all parties required to be served have been served.

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Subscribed and sworn to before me this 9th day of February, 1987.

Dana Beal Dolan

NOTARY PUBLIC,
Midland County, State of Michigan
My Commission Expires: 12-02-87

APPENDIX A

OPINION

UNITED STATES DISTRICT COURT

584 F.Supp. 419 (E.D. Mich. 1984)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - FLINT

VIVIENNE RABIDUE,

Plaintiff, No. 79-40258

v

OSCEOLA REFINING COMPANY,
a division of Texas-American
Petrochemicals, Inc.,

Defendant.

_____/

MEMORANDUM OPINION AND ORDER

I INTRODUCTION

This is an employment discrimination action brought by Vivienne Rabidue against the Osceola Refining Company. Ms. Rabidue has asserted claims of sex discrimination and sex harassment under Title VII of the 1964 Civil Rights Act 1/ and the Michigan Elliot Larsen Act. 2/ Plaintiff Rabidue also has asserted a claim under the federal Equal Pay Act. 3/

The liability issues came on for trial by the bench on May 3, 1983, and

concluded on May 7, 1983. The Court heard the testimony of several witnesses and admitted numerous exhibits. The de bene esse depositions of Charles A. Muetzel and Robert A. Fitzimmons also were admitted.

The evidence and the governing legal principles have been reviewed. Findings of fact and conclusions of law as required by Rule 52(a) of the Federal Rules of Civil Procedure are made herein.

II FINDINGS OF FACT

Plaintiff was hired by Osceola Refining Company in December of 1970. At the time, Osceola was an independently owned company. In 1974, United Refineries of Warren, Ohio purchased Osceola and operated it as a separate division.

On September 1, 1976, Osceola was acquired by Texas American Petrochemicals. It is noted that Texas American is the defendant in this lawsuit. 4/

The position for which plaintiff was hired and which she initially occupied was Executive Secretary. In this position, plaintiff performed a variety of duties including typing, fielding telephone calls and bookkeeping.

In 1973, plaintiff was promoted to the position of Administrative Assistant. This enabled plaintiff to become a salaried - rather than hourly - employee. Plaintiff also enjoyed other advantages as a result of the promotion including longer lunch hours and more liberal vacation entitlements.

The promotion brought plaintiff additional responsibilities and duties. Plaintiff was responsible for purchasing office supplies and dealing with customers. Plaintiff also was responsible for noting incoming governmental regulations and pertinent

newspaper articles. Plaintiff then either filed these materials away or forwarded them to the appropriate person in the company.

Eventually, plaintiff was assigned additional duties the most important of which were those of credit manager and office manager. Plaintiff also had the responsibility of assigning work to a number of other Osceola employees. It is noted that plaintiff never produced convincing evidence that male employees in substantially equal jobs to the jobs occupied by plaintiff received greater remuneration than plaintiff.

A prominent character in the trial evidence was Douglas Henry. Mr. Henry was an Osceola employee working as a supervisor of the company's keypunch and computer operators. Occasionally, plaintiff's duties and Mr. Henry's duties

intersected.

Mr. Henry was a crude and vulgar man. He habitually used vulgar language around the office. It was not unusual for him to make obscene comments about women, and to use words like "cunt," "pussy," and "tits." On at least one occasion Mr. Henry called plaintiff a "fat ass."

Plaintiff was annoyed by Mr. Henry's language. Other Osceola female employees also were annoyed by Mr. Henry's vulgarity. The vulgarity clearly was a problem, but not so pervasive a problem as to substantially interfere with plaintiff's employment. During the time plaintiff worked for Osceola, the company was aware of Mr. Henry's vulgarity, but was not successful in curbing it.

It also is noted that a number of other Osceola male employees occasionally displayed pictures of nude or partially

clad women in their office and work areas. Plaintiff saw these pictures during many work days.

Plaintiff doubtless was an intelligent and ambitious person. These qualities were responsible for the 1973 promotion and the delegation to her of fairly important duties. On the other hand, plaintiff - on the whole - was a rather troublesome employee. Plaintiff's supervisor and the people with whom plaintiff dealt almost uniformly found plaintiff to be abrasive, extremely willful, and difficult to get along with. This was clearly reflected in the testimony of witnesses Muetzel, Fitzsimmons, Shoemaker, Attinger and Martonosi.

Plaintiff argued with customers and yelled at other employees. In defiance of explicit instructions, plaintiff continued

to contact individual terminal managers to ask for daily liftings. This practice jeopardized Osceola's relations with major oil companies. Furthermore, the Vice President of United Refineries - Osceola's largest customer - was particularly annoyed by plaintiff's rudeness.

As a result of plaintiff's many job-related problems - in particular, her inability to work harmoniously with customers and co-workers - Mr. Shoemaker decided once and for all that plaintiff would have to be discharged. The recommendation was accepted, and plaintiff's employment position was formally terminated as of January 14, 1977. Plaintiff's replacement as Administrative Assistant was a male.

Plaintiff filed her sex discrimination charge with the EEOC on or about March 9, 1977. In this respect, it

also should be noted that the Court finds that prior to its September 1, 1976 acquisition of Osceola, defendant Texas American had no notice that plaintiff actually intended to pursue a claim of sex discrimination or sex harassment against the predecessor company, United Refineries.

III CONCLUSIONS OF LAW

As has been noted plaintiff has asserted the following claims: sex discrimination in violation of Title VII; sex discrimination in violation of the Elliott Larsen Act; sex harassment in violation of Title VII; sex harassment in violation of the Elliott Larsen Act; and violation of the federal Equal Pay Act. In this portion of the opinion, a separate analysis of each of these claims will be made.

A. Plaintiff's Title VII Sex Discrimination Claim

At the threshold, defendant has asserted a successorship defense. Pointing out that it did not acquire Osceola until September 1, 1976, defendant argues that it cannot be held liable for Osceola's alleged discrimination occurring prior to that date.

In the 1974 case of EEOC v. Macmillan Bloedel, 5/ the Sixth Circuit Court of Appeals set out a nine-point totality of circumstances test for determining Title VII successor liability. Under this test, the following factors are to be balanced: (1) whether the successor company had notice of the charge; (2) the ability of the predecessor to provide relief; (3) whether there has been a substantial continuity of business operations; (4) whether the new employer used the same

plant; (5) whether the new employer uses substantially the same work force; (6) whether the new employer uses substantially the same supervisory personnel; (7) whether the same jobs exist under substantially the same conditions; (8) whether the employer uses the same machinery, equipment and methods of production; (9) whether the employer produces the same product. 6/

The Macmillan Bloedel test seemed to be a balancing test. In 1978, however, the Sixth Circuit decided Wiggins v. Spector Freight System. 7/ There, the Sixth Circuit held that a successor employer could not be held liable if (1) charges were not filed with the EEOC at the time of the acquisition and (2) the successor had no notice of the discrimination claims. 8/ In this respect, it must be noted that the Wiggins

court explicitly stated that where these two conditions exist, the successorship claim is "removed from the rationale of MacMillan Bloedel. 9/ In light of this, the law must be interpreted as exonerating successors where these two conditions exist.

In applying Wiggins, the Court first notes that plaintiff had not filed EEOC charges at the time of the September 1, 1976 acquisition of Osceola by defendant. Next, the Court hearkens to its earlier findings that Texas American was not given notice of plaintiff's claim prior to its acquisition of Osceola. In light of these two Rule 52(a) fact findings, the Court is compelled to conclude that defendant cannot be held liable for any pre September 1, 1976 sex discrimination.

An analysis of plaintiff's Title VII disparate treatment sex discrimination

claim is next. After studying the facts, it is determined that plaintiff has failed to prove that she ever was the victim of disparate treatment Title VII sex discrimination while employed by Osceola. Thus, even if the Court had ruled in favor of plaintiff on the successorship issue, plaintiff's Title VII sex discrimination claim would fail. The explanation follows.

Plaintiff's disparate treatment Title VII claim should be viewed as a claimed continuing violation of Title VII culminating in plaintiff's discharge. With respect to the factual elements of the discrimination occurring prior to the discharge, the Court has determined that the company did not direct sex based discriminatory conduct at plaintiff. These issues will, of course, be treated in detail in the sex harassment and Equal

Pay Act portions 10/ of this opinion. For now, however, it is merely concluded that the company's pre-discharge conduct toward plaintiff was not based on anti-female animus. Absent such animus, there can be no violation of Title VII. 11/

Turning to plaintiff's discriminatory discharge claim, it is, of course, a classic disparate treatment claim bottomed on section 703(a)(1) of Title VII. In plain and simple terms, plaintiff is claiming that she was discharged because she is female.

The most recent Sixth Circuit case dealing with a discriminatory discharge is Rasimas v. Michigan Department of Mental Health. 12/ Rasimas, a multi-faceted opinion, 13/ clearly indicates that the McDonnell Douglas 14/ model is to be applied in sex discrimination unlawful discharge cases. Applying this model in

the present case, plaintiff Rabidue must show: (1) that she belongs to a protected Title VII classification; (2) that she was qualified for the Administrative Assistant position from which she was discharged; (3) that, despite her qualifications, she was discharged; (4) that, subsequent to her discharge, plaintiff was replaced by a male.

The Court finds that plaintiff satisfied the McDonnell Douglas prima facie case. The only element arguably in dispute is whether plaintiff was qualified for her position. In view of plaintiff's intelligence and experience, the Court believes plaintiff indeed was qualified to function as an Administrative Assistant. Thus, plaintiff has established a prima facie case.

As Rasimas points out, the next step in the disparate treatment analysis is to

determine whether defendant articulated a legitimate non-discriminatory reason for the discharge. This step - established in the famous Furnco 15/ and Burdine 16/ Supreme Court cases - has been recently discussed by the Sixth Circuit in two cases. Brooks v. Ashtabula County 17/ and Sones Morgan v. Hertz. 18/ These two decisions make it clear that the disparate treatment defendant need only come forward with evidence of legitimate non-discriminatory reasons for the challenged employment decision. Thus, the second step of the disparate treatment analysis merely requires the defendant to produce evidence of - rather than prove - its non-discriminatory motive.

Beyond doubt defendant met this burden of production. As was mentioned in the fact section of this opinion, defendant produced numerous witnesses who

testified that plaintiff was willful, rude and inclined not to follow company policies. This testimony easily satisfies the second prong of the Title VII disparate treatment analysis.

The final disparate treatment step focuses on the issue of pretext. The burden of proof is on plaintiff to show that the employer's asserted non-discriminatory reasons are pretextual. The term burden of proof means, of course, that the employee must show that, more likely than not, the asserted reasons for the employment decision are pretextual. 19/

The Court has concluded that plaintiff did not satisfy this burden. Plaintiff's strongest witnesses dealt with the issue of Mr. Henry's vulgarity and crudity. Very little evidence, outside of plaintiff's own testimony, tended to

establish that plaintiff was not rude or uncooperative. On the contrary, the weight of the evidence shows that plaintiff was indeed rude and uncooperative over several years. Thus, the Court concludes that plaintiff has not shown that defendant's asserted reasons for the discharge were pretextual. It follows that plaintiff has not sustained a Title VII disparate treatment claim with respect to her discharge. In other words, the Court concludes that the discharge was not the result of gender based discrimination in violation of Title VII.

B. Plaintiff's Elliott Larsen Act Sex Discrimination Claim

The Court next considers plaintiff's Elliott Larsen Act sex discrimination claim. In considering the Elliott Larsen disparate treatment standard, the Court has noted the theory that the Title VII

disparate treatment analysis should be applied in Elliott Larsen disparate treatment cases.

This theory has rather ample support. First, the text of the Elliott Larsen disparate treatment statute reads very much like the text of the Title VII disparate treatment statute. 20/ Because the Elliott Larsen Act was passed subsequent to the enactment of Title VII, 21/ it is easy to infer that the Elliott Larsen disparate treatment statutory drafters probably sought to track the Title VII disparate treatment standard.

Next, the Court will point out - as it did in its Moll opinion 22/ - that the Michigan Civil Rights Commission has issued interpretive regulations indicating that Title VII should be used as a guide in the interpretation of the Elliott Larsen Act. Because the Civil Rights

Commission is the state's chief civil rights administrative agency, the Commission's guidelines are a fairly strong argument cutting in favor of applying the Title VII disparate treatment model to plaintiff's Elliott Larsen disparate treatment claim.

Finally, and most importantly, the Michigan judiciary seems inclined toward this interpretation of the Elliott Larsen Act. While Michigan courts have not adopted wholesale the federal employment discrimination standards, 23/ and while more will be said on this matter later in this opinion, 24/ it remains that a good number of Michigan decisions resolve Elliott Larsen issues by reference to the legal standards codified in Title VII and the federal Age Discrimination Act. 25/

In light of this, the Court holds that the Elliott Larsen disparate

treatment statutes, M.C.L.A. § 37.2202(1)(a) and (c) are to be construed in the same manner as the section 703(a)(1) Title VII disparate treatment statute. It follows that, for the reasons stated in Part II-A of this opinion, plaintiff has failed to sustain her Elliott Larsen sex discrimination claim.

Similarly, the Court holds that the Elliott Larsen Act successorship issue is to be resolved in the same manner as the Title VII successorship issue. It is readily acknowledged that there is no successorship statute in either Title VII or the Elliott Larsen Act. Thus, there is no textual similarity to which the Court can point. Nevertheless, the Court believes that the Civil Rights Commission guidelines plus the Michigan decisions generally adopting the Title VII standards are enough - absent some contrary

indication by the Michigan lawmakers or the Michigan judiciary - to justify applying the Title VII successorship doctrine to the Elliott Larsen Act. And thus, for the reasons stated in Part II-B of this opinion, the successorhsip doctrine is an alternative basis for denying plaintiff's pre-acquisition Elliott Larsen disparate treatment claim.

C. Plaintiff's Title VII Sex Harassment Claim

The next theory asserted by plaintiff is that of sex harassment in violation of Title VII. Plaintiff contends that Mr. Henry's vulgar langauge and the displaying of sex oriented posters by Osceola male employees constituted unlawful sex harassment under Title VII.

Sex harassment is a relatively new Title VII concept. In the early years of Title VII, the courts, commentators and

EEOC were far more concerned with such theories as disparate impact, 26/ present effects of past discrimination, 27/ and the remedial scope of section 706(g). 28/ Today, however, sex harassment is a controversial and extremely important Title VII issue. 29/

Conceptually, the sex harassment claim should be thought of as a species of disparate treatment rooted in section 703(a)(1). In this respect, it is noted that section 703(a)(1) provides as follows:

> "It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or national origin."

The word "conditions" in section 703(a)(1) is crucial to the sex harassment

concept. Where a female employee is subject to sex harassment, she is subject to a condition of employment that is invidiously discriminatory as opposed to the conditions of employment of male employees. Because she is a woman, the sexually harassed employee is made to suffer these conditions. Therefore, her rights under Title VII have been violated.

The Court believes it is quite important to establish that the sex harassment concept has moorings in the literal language of Title VII. 30/ Unfortunately certain Title VII concepts - most notably the Griggs disparate impact theory 31/ - have no real basis as far as statutory language goes. 32/ Furthermore, a number of other Title VII concepts - most notably the Weber 33/ voluntary affirmative action theory - seem to go directly against 34/ the literal

language of the subchapter. 35/

Sex harassment, however, is within the clear letter - and probably the spirit 36/ - of Title VII. The judiciary simply cannot be accused of statutory policy making 37/ with respect to the Title VII sex harassment claim.

In setting out the elements of Title VII sex harassment, it should be noted that the Sixth Circuit has yet to render a definitive sex harassment opinion. District courts within the Circuit 38/ are, therefore, compelled to develop their own set of elements of the sex harassment claim.

One source of guidance is the EEOC sexual harassment guidelines. It should at once be pointed out, however, that the EEOC guidelines are not substantive administrative agency rules promulgated under authority of a statute. 39/

Instead, the Commission's guidelines are but interpretative rules that courts are not at all bound to follow. 40/

Nevertheless, the Commission's sex harassment guidelines definitely are a useful starting point. The most important subsection in the guidelines is at 29 CFR § 1604.11(a). This subsection provides as follows:

> "Harassment on the basis of sex is a violation of section 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or inexplicitly a term or condition of an individual's employment, (2) submission to a rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

The other relevant EEOC sex

harassment guidelines with respect to the instant case are 29 CFR § 1604.11(d) and (f). 29 CFR § 1604.11(d) provides as follows:

> "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."

29 CFR § 1604(f) provides as follows:

> "Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned."

A number of courts 41/ have adopted the EEOC guidelines in sex harassment cases. With one important qualification,

the guidelines seem to be reasonable and appropriate.

The qualification 42/ that is necessary pertains to 29 CFR § 1604.11(a)(3). This subsection defines sexual harassment as conduct which

> "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating hostile or offensive work environment."

In the Court's viewpoint the word "unreasonably" opens the door to an important conceptual development of the sex harassment theory. This word entitles the judiciary to consider the nature of the employment environment in which the given plaintiff suffered the alleged harassment. This in turn authorizes courts to consider factors such as the educational background of the plaintiff's co-workers and supervisors, the physical make up of the plaintiff's work area, and

the reasonable expectation of the plaintiff with respect to the kind of conduct that constitutes sex harassment.

Thus, under the approach sketched above, the standard for determining sex harassment would be different depending upon the work environment. Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to - or can - change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers. Clearly, the Court's

qualification is necessary to enable 29 CFR § 1604.11(a)(3) to function as a workable judicial standard.

With this qualification stated, the Court will apply the Commission's sex harassment guidelines because: (1) the guidelines seem to express the intent of Title VII as to the disparate treatment sex harassment claim, and (2) several other federal courts - including appellate courts - have applied the guidelines.

In actually applying the guidelines to this case, the Court - like other courts 43/ - will fit the guidelines into the general Title VII allocation of proof structure. Former Judge Boyle - in one of her last published opinions for the Eastern District of Michigan 44/ - set out the elements of a sex harassment prima facie case as follows: (1) the plaintiff employee must belong to a protected group;

(2) the employee must be subjected to invidious sex harassment; (3) the harassment complained of was based on sex; (4) the harassment complained of affected a term, condition or privilege of employment, (5) respondeat superior liability exists. 45/

This statement of the sex harasssment prima facie case, which has been applied by several courts, 46/ is slightly redundant. Elements 1 and 3 are essentially the same. Once the concept of sex harassment is accepted, the need for element 4 vanishes for element 2 suffices. Nevertheless, it is helpful to go through the elements as applied by my learned colleague.

First, the Court notes that plaintiff belongs to a protected classifiction, women. Next, the Court finds that Mr. Henry's language and the posters were

unwelcome. Third, for the reasons discussed above, the Court holds that the alleged acts of sex harassment were "because of sex." Fourth, for other reasons stated, the alleged sex harassment was a condition of plaintiff's employment. Fifth, the Court finds that defendant knew about Mr. Henry's language and the posters. Therefore, under well established sex harassment respondeat superior principles 47/ - as well as under 29 USC § 1604.11(d) - defendant employer can be held liable in this case.

In light of the above, the Court will hold that plaintiff has satisfied the sex harassment prima facie burden if plaintiff has carried the burden of proving that Mr. Henry's language combined with the posters constituted "sex harassment" as defined by the EEOC sex harassment guidelines as qualified by the court. Clearly,

application of the qualified guidelines is the crucial point of the Title VII sex harassment offensive environment prima facie case. The guidelines must now be applied.

The immediately applicable guideline is 29 CFR § 1604.11(a). This guideline defines Title VII sex harassment. In the event that the Court concludes that plaintiff was the victim of 1604.11(a) sex harassment, the Court will be required to conclude also tht plaintiff satisfied the prima facie case.

In applying section 1604.11(a), the first issue posed is whether the combination of Mr. Henry's vulgarity and the sexual posters constituted "other verbal or physical conduct of a sexual nature."

Obviously, there was no physical conduct in this case. Thus, the Court

need only decide whether the complained of conduct was "verbal conduct of a sexual nature." At once it must be recognized that a constitutional First Amendment issue is raised. This issue can be framed as follows: can Title VII prohibit people from verbally expressing themselves with language that is not "obscene" under the legal definition of the term? It will be seen that this issue need not be considered in this case. Nevertheless, it should be noted that this issue is raised by the present kind of case.

For now, however, the Court holds that Mr. Henry's language and the sexual posters fall within the span of the term "verbal conduct of a sexual nature." This term seems to be directed toward profane words and pictures that deal with sex. The evidence at trail clearly indicated that Mr. Henry's language and the posters

were within the span of this term. Thus, the Court will now consider the section 1604.11(a)(3) issue: whether the language and the posters had the "purpose or effect of unreasonably interfering with" plaintiff's work performance or whether the language and posters created an intimidating, hostile, or offensive working environment.

The first subissue that arises in this inquiry is whether the purpose of the language and posters was violative of subsection (3). The Court easily concludes that plaintiff proved no such purpose. The evidence at trial dealt with whether the language and posters really were present in plaintiff's work environment and the nature of the effect that the language and posters had on plaintiff and other female Osceola employees. Purpose simply was not dealt

with and certainly was not proven.

Thus, it is necessary to move on to the effect issue: was the effect of Mr. Henry's language and the sexual posters such that it (1) unreasonably interfered with Ms. Rabidue's work performance, or (2) created an intimidating work environment, or (3) created a hostile work environment, or (4) created an offensive work environment? Each subissue raised by the general effect issue will now be addressed.

In this respect, first consideration will be given to the work performance subissue. Having reviewed the record carefully, the Court concludes that the vulgar language and sex oriented posters did not interfere with plaintiff's work performance. Plaintiff's work problems resulted from her temper and stubbornness. These personal traits are not connected

with the language and posters.

Whether the language and posters created an intimidating environment is the next consideration. Again, the answer is in the negative. The Court believes that plaintiff was not at all fearful while employed at Osceola. The evidence simply does not reflect that plaintiff ever felt fear on the job.

The Court next considers whether the language and posters created a "hostile" work environment. In Judge Boyle's Coley v. Conrail opinion, it was stated that

> "to state a claim under Title VII, sexual harassment must be (1) sufficiently persuasive so as to alter the conditions of employment and create an abusive working environment and (2) be sufficiently severe and persistent to affect seriously the psychological well being of employees." 48/

Judge Boyle apparently extracted this principle from the recent Eleventh Circuit case of Henson v. City of Dundee. 49/

This Court agrees with the principle insofar as it relates to the "hostile" work environment prong of subsection 3. Applying the principle to the present case, the Court must hold that the combination of Mr. Henry's language and the posters did not make plaintiff's work environment "hostile."

The language and posters were not so drastic as to affect plaintiff's psychological well being. The evidence reflects that Mr. Henry's language was annoying, but not so shocking or severe as to actually affect the psyches of the female employees. Thus, the hostile work environment theory must be rejected.

Finally, the Court considers the final subsection 3 issue. This is the issue of whether the vulgar language and posters created an "offensive' environment.

The Court believes that the disjunctive in subsection 3 between the words "hostile" and "offensive" is significant. This evinces an EEOC intent to recognize sex harassment in circumstances milder than a "hostile" environment. The Dundee standard quoted earlier from Judge Boyle's Coley opinion clearly is directed toward the concept of a hostile work environment. The statement does not, however, seem to fit the concept of an "offensive" work environment. Therefore, this Court rejects the Henson statement as it applies to the offensive work environment prong of subsection 3.

Instead, the Court believes that an offensive work environment is created where, under an objective test, the complained of conduct is so significant a factor that the average female employee finds that her overall work experience is

substantially and adversely affected by the conduct. Under this standard the sex harassment need not be psychologically disabling. On the other hand, trivial and merely annoying vulgarity would not constitute sex harassment.

The Court now applies this version of the "offensive work environment" standard to the present case. Clearly, this is the closest issue of the case. Nevertheless, the Court must again rule against plaintiff. In this respect it first is necessary to focus on Mr. Henry's vulgarity. While the vulgarity certainly was not commendable, it remains that the evidence did not go beyond showing that this one employee was vulgar. Furthermore after reviewing the evidence, plaintiff's overall work experience was not substantially affected by Mr. Henry's vulgarity. Instead, the vulgarity merely

constituted an annoying - but fairly insignificant - part of the total job environment. Due to this Rule 52(a) finding, the Court must hold that the vulgarity did not cause plaintiff's working environment to be "offensive" under subsection 3.

Next, the Court considers the added effect of the posters. The Court believes that the posters had but a negligible effect in this case. No evidence was offered indicating that plaintiff has any especial sensitivity to erotic pictures. Furthermore, as the Court has mentioned, the subsection 3 standard pertains to the average female employee. In other words the test is an objective one.

For better or worse, modern America features open displays of written and pictorial erotica. Shopping centers, candy stores and prime time television

regularly display pictures of naked bodies and erotic real or simulated sex acts. Living in this milieu, the average American should not be legally offended by sexually explicit posters.

The Court finds that the posters had a de minimis effect on plaintiff's work environment. The combined effect of the language and posters was almost identical to the effect of the vulgar language. Therefore, the Court concludes that Mr. Henry's vulgar language combined with the sexually explicit posters was not enough to make plaintiff's working environment offensive under 29 CFR § 1604.11(a) (3). 50/

It follows that plaintiff has failed to sustain the burden of proof that she suffered sex harassment. It likewise follows that plaintiff has failed to sustain her burden of establishing a sex

harassment prima facie case, and the Court must hold that plaintiff is not entitled to relief under her Title VII sex harassment claim.

It should be noted, of course, that the successorship defense would have precluded pre-acquisition liability even if the Court's sex harassment ruling had not been in favor of defendant. It can be seen, however, that this sex harassment ruling renders the successorship theory an unneeded defense.

D. Plaintiff's Elliott Larsen Sex Harassment Claim

Plaintiff next has asserted that she was the victim of sex harassment in violation of the Elliott Larsen Act. The reflex action would be to hold at once that a "no-cause" on the Elliott Larsen claim follows ineluctably from the Court's Title VII "no-cause" ruling. Careful

reflection, however, shows that this approach would be most unsound.

Earlier in this opinion, 51/ the Court indicated that the Elliott Larsen disparate treatment and successorship concepts track their Title VII counterparts. It must be pointed out, however, that state fair employment practices laws should not necesarily be identical to their federal counterparts. Indeed, the state fair employment practices laws may be inclined to grant more - or less - in the way of civil liberties protections 52/ than the counterpart federal statutes.

Federal courts must thoroughly investigate whether such state laws are modeled on federal laws. Differences may well exist, and thus a set of facts litigated in one forum may result in different legal results in the other

forum. This, of course, is the problem not dealt with by the Supreme Court in its Kremer decision 53/ which held that federal courts are bound to apply res judicata after a discrimination claim has been resolved by state courts. 54/ In any event this particular court will take great care before deciding that a state fair employment practices concept is the same as the federal concept.

Moving on to the sex harassment claim, it first is noted that - unlike Title VII - the Elliott Larsen Act explicitly deals with the sex harassment concept. In the definition section of the Elliott Larsen Act, it is provided that "Discrimination because of sex includes sexual harassment . . ." The pertinent definitional subsection - M.C.L.A. § 37.2103(h) - then goes on to define the conduct constituting sex harassment. It

thus is unnecessary to engage in verbal or theoretical exercises in order to tie the sex harassment concept to the literal language of the Elliott Larsen Act.

M.C.L.A. § 37.2303(h) is very similar to the the EEOC sex harassment guidelines codified at 29 CFR § 1604.11(a). M.C.L.A. § 37.2103(h)(i) closely resembles 29CFR § 1604.11(a)(1); MCLA § 37.2103(h)(ii) closely resembles 29 CFR § 1604.11(a)(2); and MCLA § 37.2103(h)(iii) closely resembles 29 CFR § 1604.11(a)(3). Subsections (h)(i) and (h)(ii) deal with submitting to sexual demands and thus are not relevant to the present case. The only relevant Elliott Larsen sex harassment subsection is M.C.L.A. § 37.2103(h)(iii). This subsection provides as follows:

> "Discrimination because of sex includes sex harassment which means unwelcome sexual advances, requests

> for sexual favors and other verbal or physical conduct or communication of a sexual nature when such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating hostile or offensive employment . . . environment."

Beyond question the text of the subsection was closely modelled on subsection (a)(3) of 29 CFR §§1604.11. The only real difference between the two provisions is that the EEOC guideline contains the term "unreasonably interfering" rather than the term "substantially interfering." Thus, in applying M.C.L.A. § 37.2103(h)(iii), the Court will utilize much of its earlier application of 29 CFR § 1604(a)(3) to plaintiff's Title VII sex harassment claim. It is, however, worth emphasizing that this analysis follows from the textual similarity noted above rather than a basic presumption that the Elliott

Larsen Act must parallel Title VII.

Thus, for the reasons stated in the Title VII sex harassment section of this opinion, 55/ it is concluded that the combination of Mr. Henry's vulgar language and the posters constituted "verbal conduct of a sexual nature." Similarly, for the reasons stated in the earlier part of this opinion, 56/ the Court does not believe that the language and posters had the purpose or effect of creating an intimidating, hostile or offensive employment environment.

Thus, the sole remaining issue as to the Elliott Larsen Act sex harassment claim is whether the posters and vulgar language substantially interfered with plaintiff's work environment. As the Court has pointed out, 57/ it does not believe that these two factors constituted substantial interference in plaintiff's

work life. The posters and vulgar language were annoying, but they did not rise to the point of substantially interfering with plaintiff's job.

It follows that the Court must conclude that plaintiff has failed to sustain her claim of sex harassment under the Elliott Larsen Act. 58/

E. Plaintiff's Equal Pay Act Claim

The final claim asserted by plaintiff is an Equal Pay Act claim. Plaintiff contends that she was not paid at a rate - including fringe benefits - equal to the rate received by male employees of defendant who performed substantially the same work as plaintiff.

29 USC § 206(d)(1), embedded in the Fair Labor Standards Act, is the operative provision of the Equal Pay Act. Under this statute a covered employer may not pay

> "wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work or jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions . . ."

Section 206(d)(1) then sets out a number of exceptions that are not applicable in this case.

As the Sixth Circuit has recently pointed out, an Equal Pay Act claimant has the prima facie case burden of proving that she performed equal work, but received less than equal pay. 59/ With respect to the "equal work" issue, the Equal Pay Act claimant must show that her job is substantially equal to the better paying job occupied by a member of the opposite sex. 60/

The Court finds and concludes that plaintiff has failed to meet even the prima facie case under section 206(d)(1).

Plaintiff failed to bring forth evidence showing that males occupied a substantially equal job to plaintiff's job, but received greater pay. Plaintiff did attempt to bring forth proof of isolated fringe benefits received by male employees, but plaintiff simply never showed that substantially equal jobs to plaintiff's various jobs were remunerated at a greater rate, including fringe benefits. Absent the two-pronged showing of (1) substantially equal work and (2) unequal pay, there can be no Equal Pay Act claim. Indeed, absent these two elements, there can be no prima facie Equal Pay Act case.

In view of the above the Court concludes that plaintiff has failed to sustain her Equal Pay Act case. It is noted that the successorship issue as an alternative basis for rejecting

plaintiff's pre-acquisition Equal Pay Act claim was not explored. In this respect it must be recognized that as part of the Fair Labor Standards Act - rather that Title VII - the Equal Pay Act successorship doctrine is not necessarily identical to the Title VII successorship doctrine. In any event, this issue was not considered because it was so clear that plaintiff failed to even come close to meeting the Equal Pay Act prima facie case.

IV CONCLUSION AND ORDER

For the reasons stated in the foregoing opinion, the Court finds and concludes that plaintiff Rabidue has failed to sustain any of the claims which she has asserted. Therefore, the Clerk of the Court is to enter a judgment indicating that defendant has prevailed in this case and plaintiff takes nothing.

IT IS SO ORDERED.

FOOTNOTES

1/ 42 U.S.C § 2000(e) et seq.

2/ M.C.L.A. § 37.2101 et seq.

3/ 29 U.S.C. § 206(d).

4/ The date that defendant acquired Osceola Refining Co. is relevant to defendant's successorship defense. See nn 5-8 and accompanying text infra.

5/ 503 F.2d 1086 (CA 6, 1974).

6/ See id. at 1094.

7/ 583 F.2d 882 (CA 6, 1978).

8/ See id. at 886.

9/ See id.

10/ The Title VII sex harassment claim is analyzed at nn 31-55 and accompanying test infra. The Equal Pay Act claim is analyzed at nn 67-68 and accompanying text infra.

11/ See generally EEOC v. Maxwell Co., 726 F.2d 282 (CA 6, 1984).

12/ 714 F.2d 614 (CA6, 1983).

13/ Rasimas also contained significant holdings on the issues of timely filing and mitigation of damages. See 714 F.2d 614, 620-22, 623-626. These two issues, of course, are not relevant to the present opinion.

14/ In McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), the Supreme

Court set out the allocation of proof burdens in the basic Title VII disparate treatment case. McDonnell Douglas is applied at pp. 622-623 of the Rasimas opinion. See 714 F.2d 614, 622-623.

15/ Furnco Construction Co. v. Water, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978).

16/ Texas Department of Community Affairs v. Burdine, 25 FEP cases 113 (1981).

17/ 717 F.2d 263 (CA 6, 1983).

18/ 725 F.2d 1070 (CA 6, 1984).

19/ See Sones Morgan v. Hertz Co., 725 F.2d 1070 (CA 6, 1984). The nature of the employee's pretext burden will be further clarified when the Supreme Court decides the Westinghouse v. Vaughn case. See 52 USLW 3033, 3659. The Supreme Court heard arguments on Vaughn during the week of March 19, 1984. See USLW 3659. See also the Vaughn Eighth Circuit opinion at Vaughn v. Westinghouse, 702 F.2d 137 (CA 8, 1983).

20/ Cf. M.C.L.A. § 37.2202(1)(a) with 2000e-2(a)(1).

21/ Title VII was enacted on July 2, 1964 and became effective on July 2, 1965. See 2000e-15(a). The Elliott Larsen Act, P.A. 1976; No. 453, § 101, became effective on March 31, 1977.

22/ Moll v. Parkside Livonia Credit Union, 525 F.Supp. 786 (ED Mich., 1981).

23/ See e.g., Civil Rights Dept. v. Sparrow, 119 Mich.App. 387, 326 N.W.2d 519 (1982); Northville Schools v. Civil Rights Commission, 118 Mich.App. 573, 325 N.W.2d 497 (1982).

24/ See nn. 56-60 and accompanying text infra.

25/ This certainly appears to be the majority approach in Michigan at the present time. Several important Michigan Elliott Larsen decisions rely heavily on analogies and precedents drawn from the federal law of employment discrimination. See e.g., Adama v. Doehler Jarvis, 115 Mich.App. 82, 320 N.W.2d 298 (1982); Gallaway v. Chrysler Corp., 105 Mich.App. 1, 306 N.W.2d 368 (1981); Civil Rights Commission v. Taylor School District, 96 Mich.App. 43, 292 N.W.2d 161 (1980); Dept. of Civil rights v. GMC, 93 Mich.App. 366, 287 N.W.2d 240 (1979).

In this regard Judge Cohn has recently made the follwing remark:

> "Michigan courts in interpreting Elliott Larsen regularly rely on federal court decisions, interpreting like provisions of Title VII. Michigan Dept. of Civil Rights v. GMC, 93 Mich.App. 366 (1979). Therefore, a violation of Title VII is a violation of Elliott Larsen."

26/ The leading disparate impact decision was, of course, Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). Presaging Griggs was the most influential law review article in the history of Title VII, Cooper and Solol, Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harvard Law Rev. 1598 (1979). The classic post Griggs disparate impact article was Blumrosen, Strangers in Paradise: Griggs v. Duke Power Co. and The Concept of Employment Discrimination, 71 Michigan Law Rev. 59 (1972).

27/ This theory was born at the district court level in Quarles v. Philip Morris, 279 F.Supp. 505

(ED Va, 1968), and was lauded in the scholarly community. See e.g., Blumrosen, Seniority and Equal Employment Opportunity: A Glimmer of Hope, 23 Rutgers Law Rev. 268 (1969). The theory, however, was laid to rest by the Supreme Court in the famous case of Teamsters v U.S., 431 U.S. 324 (1977).

28/ See e.g., Allemarle Paper Co. v. Moody 422 U.S. 95 S.Ct. 2362, 45 L.Ed2d 280 (1975); Franks v. Bowman Transportation Co. 424 U.S. 747 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); Stacy, Title VII Seniority Remedies in A Time of Economic Downturn, 28 Vanderbilt Law Rev. 487 (1975).

29/ Indeed, it may well be that sex harassment is the hottest present day Title VII issue. For just a sample of recent Title VII district court sex harassment opinions, see Davis v. Western Southern Life Insurance Co., 34 FEP Cases 97 (ND Ohio, 1984); Coley v. Conrail, 34 FEP Cases 129 (ED Mich, 1982); Fegh v. General Electric Co., 34 FEP Cases 135 (ED PA, 1983); Schaffer v. National Can Co., 34 FEP Cases 172 (ED PA, 1983).

It also is interesting to note that sex harassment is becoming increasingly important in the arbitration forum. Of course, arbitration decisions have little or no weight in subsequent Title VII litigation. See Alexander v. Gardner-Denver, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). Nevertheless, the sex harassment arbitration decisions reflect that the sex harassment concept is not appearing in a wide variety of labor law settings. For recent sex harassment arbitratrion decisions, see Dayton Power and Light Co. 80 LA 19 (1982); Fisher Foods Inc., 80 LA 133 (1983).

30/ The Sixth Circuit often has emphasized the importance of statutory language in ascertaining

the intent of statutes. For the latest Sixth Circuit tuition on this subject, see pp 10-14 of the March 22, 1984 slip opinion in Patterson Trust v. US #82-3750 (CA 6, 1984).

31/ See Griggs v. Duke Power Co., 401 U.S. 424 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). The disparate impact concept was strongly reaffirmed by the Supreme Court in Teal v. State of Connecticut, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982). After Teal, an individual component - such as a test - of a selection process can be challenged if the individual component produces a disparate impact even where the eventual selection rate does not reflect a disparate impact.

32/ For a presentation of the contrary position, see the Cooper and Solol article cited at fn 31 supra. The authors attempt to show that the language of section 703(a) (2) of Title VII supports the disparate impact theory. See 82 Harvard Law Rev. 1608-1615 (1969). The effort, however, fails. Professor Boyd - a staunch advocate of disparate impact and an obvious liberal - frankly states:

> "The impact test itself was more a creature of judicial decision than congressional direction. Neither the statute nor the legislative history demand for a manifest relationship between an employment policy challenged and job performance."

Boyd, Purpose and Effect in the Law of Race Discrimination: A Response to Washington v. Davis, 57 U Det.J. Urban Law 706, 745 (1980).

33/ United Steelworkers v. Weber, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), was the Supreme Court case holding that private employers may implement racial quota affirmative actions plans without violating Title VII.

34/ The literal language of section 703(a) (1) of Title VII proscribes all racial discrimination. Furthermore, the literal language of section 703(j) explicitly provides that Title VII does not require racial balancing. The conclusion is thus inescapable that Weber runs directly against the letter of Title VII.

The classic judicial criticism of Weber is Justice Rehnquist's Weber dissent. See United Steelworkers v. Weber, 443 US 193, 218-254, 99 S.Ct. 2721, 2734-53, 61 L.Ed.2d 480 (Rehnquist J. dissenting). The most interesting academic criticism of Weber is Professor Meltzer's article. See Meltzer, The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment, 47 U. Chicago Law Rev. 425 (1980).

35/ Weber apparently resolves the Title VII racial quota issue. The constitutionality of racial quotas, however, may not be as clearly settled. For this Court's viewpoint on the constitution, racial quotas and the distinction between goals and quotas, see Marsh v Board of Education, 581 F.Supp. 614 (1984).

36/ This is so in spite of the curious genesis of the Title VII sex discrimination prohibition. This Court - like all Title VII enthusiasts - is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith. But the joke backfired on Smith when the amendment was adopted on the floor of the House under the House five-minute rule. See Vass, Title VII Legislative History, 7 B.C. Inc. & Com. Law Rev. 431, 441-42 (1966).

While sex discrimination thus was not even close to being a major concern of the original drafters of Title VII, it cannot be denied that

sex discrimination was indeed very important to the 1972 and 1978 amendments to Title VII. See e.g., the Pregnancy Discrimination Act of 1978 amending section 701(k) of Title VII to cover pregnancy discrimination. Therefore, it is entirely correct to conclude that Title VII - as it now stands - reflects a deep commitment to the eradication of gender based discrimination.

37/ Federal statutory policy making is the bailiwick of the elected lawmakers rather than the appointed federal judges. When a federal judge interprets a statute, his energies should be totally focussed on the intent of the statute's drafters. John Hart Ely has opined that if a federal judge injects his own policy beliefs into statutory interpretation, people should

> "conclude that he was not doing his job and might even consider a call to the lunacy commission."

Ely, Democracy and Distrust: A Theory of Judicial Review. The issue of federal court policy making is, or course, more complex when the constitution is to be interpreted. See generally, Ely, id; Grano, Judicial Review and a Written Constitution, 28 Wayne Law Rev. 1 (1981); Perry, Non Interpretive Review in Human Rights Cases: A Functional Justification, 56 NY U. Law Rev. 278 (1981).

38/ Several judges sitting in the Eastern District of Michigan have written detailed sex harassment opinions. See e.g., Coley v. Conrail, 34 FEP 129 (ED Mich, 1982, opinion by former Judge Boyle); Sand v. Johnson Co., 33 FEP Cases 716 (ED Mich, 1982, opinion by Judge Cohn); Hill v. BASF Wyandotte Corp., 27 FEP Cases 66 (ED Mich, 1981, opinion by Judge Freeman).

39/ In a famous discussion, the Supreme Court declared that the EEOC guidelines are merely interpretive - rather than substantive - regulations. Gilbert v. General Electric, 429 U.S. 125, 140-145 97 S.Ct. 401, 410-13, 50 L.Ed.2d 343 (1976). After Gilbert, it is entirely resolved that the Commission's guidelines are nothing more than an informed source of guidance that the judiciary may or may not follow.

40/ See id. Perhaps the EEOC should study Gilbert a little harder. So many of the Commission's guidelines declare that various employment policies "are unlawful" or "shall be unlawful." See e.g.., 29 CFR § 1604.7; 29 CFR § 1604.9(f). But the Commission cannot dictate - it can only suggest. When this is kept in mind, the tenor of the EEOC guidelines seems most inappropriate.

The Court remembers a movement in the Congress that enacted Title VII directed toward conferring cease and desist remedial power on the EEOC. Under this proposal the Commission's remedial authority would have rivalled the remedial authority conferred on the National Labor Relations Board by section 10(c) of the National Labor Relations Act, 29 US § 1601(c).

This idea, however, was quashed by fears that the EEOC would be too high handed. See generally, Van, Title VII Legislative History, 7 B.C. Industrial and Commercial Law Rev. 432 (1966). The style and substance of the present day EEOC guidelines give the early warning about the EEOC a prophetic ring.

41/ See e.g., Henson v. City of Dundee, 29 FEP Cases 787 (CA 11, 1982); Bundy v. Jackson, 641 F.2d 934 (DC Cir, 1981).

42/ The "qualification" to which the Court refers merely is an interpretation of the word "unreasonably" as used in 29 CFR § 1604.11(a) (3). This Court believes that the reasonableness concept as used in the guideline invites judicial analysis.

43/ See e.g., Henson v. City of Dundee, 29 FEP Cases 787 (CA 11, 1982); Davis v. Western Southern Life Insurance Co., 34 FEP Cases 97 (ND Ohio, 1984); Coley v. Conrail, 34 FEP Cases 129 (ED Mich, 1982); Hill v. BASF Wyandotte Co., 27 FEP Cases 66 (ED Mich, 1981).

44/ See Coley v. Conrail, 34 FEP Cases 129 (ED Mich, 1982). Subsequent to Coley Judge Boyle accepted an appointment to the Michigan Supreme Court.

45/ See Coley v. Conrail, 34 FEP Cases 129, 131 (ED Mich, 1982).

46/ See e.g., id. See also Henson v. City of Dundee, 29 FEP Cases 787 (CA 11, 1982); Hill v. BASF Wyandotte Corp., 27 FEP Cases 66 (ED Mich, 1981). The above two decisions preceded - and were cited in Judge Boyle's Coley opinion. Clearly, therefore, Judge Boyle did not create this version of the prima facie sex harassment test.

47/ See Henson v. City of Dundee, 29 FEP Cases 787 (CA 11, 1982); Bundy v. Jackson, 641 F.2d 934 (DC Cir, 1981). These cases stand for the settled Title VII proposition that respondeat superior liability attaches where the employer knew or should have known of the discrimination or harassment.

This Court fervently hopes that this bright line respondeat superior rule continues to be the

law under Title VII. The other federal court civil rights statutory giant - 42 U.S.C § 1983 - is plagued by doctrinaire disputes over the concept of section 1983 respondeat superior liability.

In the Sixth Circuit, district courts currently are baffled by the cases of Brandon v. Allen, 719 F.2d 151 (CA 6,1983) and Bellamy v. Bradley, 729 F.2d 416 (CA 6, 1984). Brandon and Bellamy - authored by different panels - set out entirely different respondeat superior section 1983 standards. Because the respondeat superior issue constantly arises in section 1983 litigation, the conflict between the two cases presents an extremely serious problem.

For an interesting theoretical discussion of the respondeat superior issue by one of the country's leading constitutional tort experts, see Nahmod, Constitutional Accountability in Section 1983 Litigation, 68 Iowa Law Rev. 1 (1982).

48/ See Coley v. Conrail, 34 FEP Cases 129, 133 (ED Mich, 1982).

49/ See 29 FEP Cases 787, 794-95 (CA 11, 1982).

50/ This Court is well aware that a sex harassment claim can be stated under subsections 1 and 2 of 29 CFR § 1604.11(a). These claims, however, were not asserted or even arguably raised by the proofs of Rabidue. Clearly, plaintiff's sex harassment claim could only be based on 29 CFR § 1604.11(a) (3). Therefore, there is no need to analyze subjections 1 and 2 in this opinion.

51/ See nn 20-24 and accompanying text supra.

52/ Because of the increasing conservatism of the federal bench, it appears likely that civil

liberties will not be afforded less protection in state courts. Indeed, there are observers who believe that the state courts will assume the leading role in the field of civil liberties law. See Barbash, State Courts Expanding Individuals' Rights, p. 1, April 2, 1984 edition of the Washington Post.

The Court wonders about this theory. State judges lack the political insularity of their Article III federal court counterparts. This fundamental fact of state judicial life is enormously important - especially with respect to state trial judges in closely knit communities. Such judges must periodically ask society for re-election votes. It may be unrealistic to expect the same judges to enforce restraints on society in the name of protecting the civil liberties of the individual.

53/ See Kremer v. Chemical Construction Co., 456 U.S. 461, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982).

54/ For a forceful criticism of Kremer, see Bartosic and Minda, Labor Law Myth In the Supreme Court 1981 Term: A Plea For Realistic and Coherent Theory 30 UCLA Law Rev. 271, 290-294 (1982). Kremer is being applied all too vigorously. Two Circuits have held that Kremer mandates res judicata where an employer initiates state court judicial review. See Gonsalves v. Alpine Country Club, 33 FEP Cases 1817 (CA 1, 1984), Davis v. US Steel Supply, 29 FEP Cases 1202 (CA 3, 1982). This interpretation of Kremer operates to deprive the employment discrimination plaintiff of a federal court forum even where the plaintiff has not chosen to resort to the state courts. See Bartosic and Minda, Labor Law Myth and the Supreme Court 1982 Term: A Plea For Realistic and Coherent Theory, 30 UCLA Law Rev. 271, 293 (1982).

55/ See nn 26-50 and accompanying text supra.

56/ See nn 46-50 and accompanying text supra.

57/ See id.

58/ It also should be noted that plaintiff's pre-acquisition sex harassment claim alternatively was foreclosed by the Court's successorship ruling.

59/ See Bence v. Detroit Health Corp., 712 F.2d 1024 (CA 6, 1983).

60/ See Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223, 41 L.Ed.2d 1 (1974); Morgado v. Civil Defense Co., 32 FEP Cases 12 (CA 11, 1983); EEPC v. Central Kansas Medical Center, 31 FEP Cases 1510 (CA 10, 1983); Hein v. Oregon College of Education, 33 FEP Cases 1538 (CA 9, 1983); EEOC v. Mercy Hospital, 32 FEP Cases 991 (CA 7, 1983); EEOC v. American Pharmaceutical Assoc., 33 FEP Cases 924 (DC RI, 1983); Winkes v. Brown University, 32 FEP Cases 1041 (1983); Serpe v. Four Phase System, 33 FEP Cases 169 (ND California, 1982).

APPENDIX B

OPINION

UNITED STATES COURT OF APPEALS

SIXTH CIRCUIT

No. 84-1362

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 84-1362

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VIVIENNE RABIDUE,
Plaintiff-Appellant,

v.

OSCEOLA REFINING COMPANY, a division of Texas-American Petrochemicals, Inc.,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed November 13, 1986

Before: KEITH, KRUPANSKY and MILBURN, Circuit Judges.

KRUPANSKY, Circuit Judge, delivered the opinion of the court, in which MILBURN, Circuit Judge, joined. KEITH, Circuit Judge, (pp. 21-29) delivered a separate opinion concurring in part and dissenting in part.

KRUPANSKY, Circuit Judge. The plaintiff Vivienne Rabidue (plaintiff or Rabidue) timely appealed the district court's judgment in favor of defendant Osceola Refining Co. (Osceola), a division of Texas-American Petrochemicals, Inc. (defendant or Texas-American), after a bench trial on plain-

tiff's charges of sex discrimination and sexual harassment. In her complaint, the plaintiff asserted charges of sex discrimination and sexual harassment in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, Michigan's Elliott Larsen Act, Mich. Comp. Laws Ann. § 37.2101 *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d). A memorandum opinion and judgment of the district court concluded that: (1) the defendant Texas-American, a successor corporation, was not liable for any preacquisition sex discrimination; (2) evidence of the plaintiff's hostile personality, willful rudeness, and disregard for company policies satisfied the burden of proof placed upon the defendant to articulate nondiscriminatory reasons in support of her discharge; (3) the plaintiff failed to produce evidence in support of her charge that the defendant's articulated nondiscriminatory reasons for discharge were pretextual; (4) a male employee's language and sexual poster displays constituted "verbal conduct of a sexual nature" within the meaning of the sexual harassment guidelines promulgated by the Equal Employment Opportunity Commission (EEOC); (5) the language and posters did not create an environment of harassment necessary to support a charge of sexual harassment; (6) the plaintiff failed to establish sexual harassment under Michigan's Elliott Larsen Act; and (7) the plaintiff failed to establish Equal Pay Act violations. *Rabidue v. Osceola Refining Co.*, 584 F.Supp. 419 (E.D. Mich. 1984).

A review of the record disclosed that the plaintiff entered the employ of Osceola during December of 1970, at which time Osceola was an independently owned company. In 1974, United Refineries of Warren, Ohio acquired Osceola and operated it as a separate division. On September 1, 1976, Osceola was acquired by Texas-American, which corporation is the defendant in this lawsuit.

The plaintiff initially occupied the job classification of executive secretary. In that position, she performed a variety of duties, which included attending the telephone, typing,

and a limited amount of bookkeeping. In 1973, the plaintiff was promoted to the position of administrative assistant and became a salaried rather than hourly employee. Her new position entitled her to a longer lunch hour, more liberal vacation allowances, together with various other benefits. In her position of administrative assistant, the plaintiff was responsible for, among other duties, purchasing office supplies, monitoring and/or distributing incoming governmental regulations, and contacting customers. Subsequently, she was assigned additional duties as credit manager and office manager. Included in the plaintiff's new responsibilities was the authority to assign work to a number of other Osceola employees.

The plaintiff was a capable, independent, ambitious, aggressive, intractable, and opinionated individual. The plaintiff's supervisors and co-employees with whom plaintiff interacted almost uniformly found her to be an abrasive, rude, antagonistic, extremely willful, uncooperative, and irascible personality. She consistently argued with co-workers and company customers in defiance of supervisory direction and jeopardized Osceola's business relationships with major oil companies. She disregarded supervisory instruction and company policy whenever such direction conflicted with her personal reasoning and conclusions. In sum, the plaintiff was a troublesome employee.

The plaintiff's charged sexual harassment arose primarily as a result of her unfortunate acrimonious working relationship with Douglas Henry (Henry). Henry was a supervisor of the company's key punch and computer section. Occasionally, the plaintiff's duties required coordination with Henry's department and personnel, although Henry exercised no supervisory authority over the plaintiff nor the plaintiff over him. Henry was an extremely vulgar and crude individual who customarily made obscene comments about women generally, and, on occasion, directed such obscenities to the plaintiff. Management was aware of Henry's vulgarity, but had been unsuccessful in curbing his offensive personality

traits during the time encompassed by this controversy. The plaintiff and Henry, on the occasions when their duties exposed them to each other, were constantly in a confrontation posture. The plaintiff, as well as other female employees, were annoyed by Henry's vulgarity. In addition to Henry's obscenities, other male employees from time to time displayed pictures of nude or scantily clad women in their offices and/or work areas, to which the plaintiff and other women employees were exposed.

The plaintiff was formally discharged from her employment at the company on January 14, 1977 as a result of her many job-related problems, including her irascible and opinionated personality and her inability to work harmoniously with co-workers and customers. The immediate incidents that precipitated the plaintiff's termination included a heated argument with Charles Shoemaker (Shoemaker), the vice-president of Osceola, concerning the implementation of certain accounting practices and procedures by the company and a subsequent, vitriolic confrontation with Robert Fitzsimmons (Fitzsimmons), the vice-president of United Refineries, one of Osceola's major customers, concerning pricing schedules that existed between the companies. The latter incident proved to be highly embarrassing to Shoemaker, especially since the plaintiff intruded into his office while he was meeting with Fitzsimmons. A male employee assumed the plaintiff's former duties as administrative assistant.

Subsequent to her discharge, the plaintiff applied for unemployment benefits with the appropriate state agency, payment of which the company opposed. The plaintiff also timely filed charges of discrimination against her former employer with the EEOC and thereafter commenced the instant action in the district court. At the conclusion of a five-day bench trial which involved the testimony of several witnesses and numerous exhibits, the trial court entered its findings of fact and conclusions of law. *See Rabidue*, 584 F.Supp. 419.

The plaintiff assigned several errors to the trial court's findings of fact and conclusions of law. Mindful of its responsibilities, this court, at the outset, notes that the district court's factual findings are subject to a clearly erroneous standard of review. Federal Rule 52 provides: "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed.R.Civ.P. 52(a). A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Anderson v. Bessemer City*, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948). This standard does not permit a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. *Anderson*, 105 S.Ct. at 1511. Where there are two permissible views of the evidence, the interpretation assigned by the fact-finder must be adopted. *Id.* at 1512. Rule 52 demands even greater deference to the trial court's findings where they are based on credibility determinations. *Id.*

Initially, this court's attention is directed to the defendant Texas-American's asserted successorship defense. It argued that since it did not acquire Osceola until September 1, 1976, it could not be held liable for Osceola's alleged discrimination which occurred prior to that acquisition date. The issue of the defendant's liability as a successor is disposed of by this circuit's pronouncements in *Wiggins v. Spector Freight System, Inc.* 583 F.2d 882 (6th Cir. 1978). In *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974), which predated *Wiggins* by approximately four years, this circuit enunciated nine criteria to be applied in evaluating successor liability for purposes of Title VII. The *MacMillan* court directed balancing of the following factors: (1) notice of the charged discrimination by the successor or lack thereof;

(2) the ability of the predecessor to provide relief; (3) whether there had been a substantial continuity of business operations; (4) whether the new employer continued to utilize the same plant; (5) whether the successor continued to employ substantially the same work force; (6) whether the new employer continued to use substantially the same supervisory personnel; (7) whether the same jobs remained in existence under substantially the same conditions; (8) whether the employer continued to use the same machinery, equipment, and methods of production; and (9) whether the successor continued to produce the same products. *Id.* at 1094. *See generally* 1 Larson, Employment Discrimination § 5.33 (1985); Annot., 67 A.L.R. Fed. 806 (1984 & Supp. 1985).

In its subsequent decision in *Wiggins*, this circuit reaffirmed the balancing test of *MacMillan* with the caveat that upon a factual finding that (1) charges of discrimination had not been filed with the EEOC at or before the time of acquisition, and (2) the successor had no notice of contingent charges of discrimination at or before the time of acquisition, the case was removed from the rationale of *MacMillan* and successor liability would not attach, thus relieving the trial court from applying the balancing test mandated by *MacMillan*. *Wiggins*, 583 F.2d at 886. Accordingly, this court, having reviewed the record, concludes that the findings of the district court, that (1) there were no charges of discrimination filed or pending before the EEOC at or before the time of Osceola's acquisition by Texas-American, and (2) that Texas-American was unaware of any outstanding or contingent charges of discrimination at or before its acquisition of Osceola, were not clearly erroneous. The district court's disposition of the successorship issue, when considered in the context of the pronouncements of *Wiggins*, was therefore correct. The district court's conclusion that Texas-American was not legally responsible for any claims of unlawful sex discrimination or

sexual harassment prior to its acquisition of Osceola is AFFIRMED.[1]

The plaintiff anchored her charges of sex discrimination and sexual harassment in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Michigan Elliott Larsen Act, Mich. Comp. Laws Ann. § 37.2101 *et seq.* A comparative analysis of the foregoing legislation disclosed that the language of the Elliott Larsen Act disparate treatment statutory provision, enacted some ten years subsequent to the effective date of Title VII, essentially tracked the disparate treatment language of Title VII. It is apparent that the similarity was intentional. Moreover, as the district court indicated in its opinion:

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[1] This court observes that the district court did not premise its judgment in favor of the defendant Texas-American solely on its resolution of the successorship issue. Rather, the district court proceeded to independently resolve each of the plaintiff's substantive claims, charged pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, the Michigan Elliott Larsen Act, Mich. Comp. Laws Ann. § 37.2101 *et seq.*, and the Equal Pay Act, 29 U.S.C. § 206(d), as those claims concerned defendant Texas-American.

The plaintiff charged in the district court and argued on appeal that the alleged sex discrimination, and specifically the alleged sexually hostile work environment, were of an ongoing nature from the time of her employment by Osceola in 1970 and that such conditions continued to prevail for several months after Texas-American acquired Osceola while she was an employee of Texas-American. On appeal, the plaintiff not only argued that Texas-American was liable as a successor to United Refineries and Osceola, but specifically urged that Texas-American was liable for its own acts of commission and omission effected during the period of her employment by Texas-American after its takeover of Osceola from United Refineries. In light of these allegations, this court is constrained to address the totality of the plaintiff's substantive counts, i.e., disparate treatment, sexual harassment, and retaliatory conduct, alleged to have occurred after the Texas-American acquisition, despite the fact that resolution of the successor liability issue in favor of the defendant absolved Texas-American of liability for any *pre*acquisition discriminatory actions.

> [T] he Michigan Civil Rights Commission has issued interpretive regulations indicating that Title VII should be used as a guide in the interpretation of the Elliott Larsen Act. Because the Civil Rights Commission is the state's chief civil rights administrative agency, the Commission's guidelines are a fairly strong argument cutting in favor of applying the Title VII disparate treatment model to plaintiff's Elliott Larsen disparate treatment claim.
>
> Finally, and most importantly, the Michigan judiciary seems inclined toward this interpretation of the Elliott Larsen Act. While Michigan Courts have not adopted wholesale the federal employment discrimination standards, . . . it remains that a good number of Michigan decisions resolve Elliott Larsen issues by reference to the legal standards codified in Title VII and the federal Age Discrimination Act.

Rabidue, 584 F.Supp. at 426 (footnotes omitted) (citing, *inter alia*, *Adama v. Doehler-Jarvis*, 115 Mich. App. 82, 320 N.W.2d 298 (1982), *rev'd on other grounds*, 419 Mich. 905, 353 N.W.2d 438 (1984); *Gallaway v. Chrysler Corp.*, 105 Mich. App. 1, 306 N.W.2d 368 (1981); *Michigan Department of Civil Rights v. Taylor School District*, 96 Mich. App. 43, 292 N.W.2d 161 (1980); *Michigan Department of Civil Rights v. General Motors Corp.*, 93 Mich. App. 366, 287 N.W.2d 240 (1979), *aff'd*, 412 Mich. 610, 317 N.W.2d 16 (1982)). In light of the foregoing, the district court's conclusion that the Elliott Larsen Act disparate treatment provisions, Mich. Comp. Laws Ann. §§ 37.2202(1)(a) & (c), should be construed in the same manner as § 703(a)(1) of Title VII, 42 U.S.C. § 2000e-(2)(a)(1), is AFFIRMED.[2]

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[2] This court also endorses the district court's conclusion that, absent an express successorship provision in either Title VII or the Elliott Larsen Act and considering the Michigan Civil Rights Commission guidelines and the Michigan judiciary's inclination generally to adopt Title VII standards in the interpretation of the Elliott Larsen Act, sufficient justification existed for applying Title VII successorship doctrine to the Elliott Larsen Act sex discrimination and sexual harassment claims. *See Rabidue*, 584 F.Supp. at 427, 435 n.58.

This court has examined the trial court's disposition of the plaintiff's Title VII and Elliott Larsen Act sex discrimination claims and the error assigned thereto. In arriving at its decision, the district court viewed the plaintiff's disparate treatment sex discrimination charge as alleging continuing sex-based discriminatory conduct on the part of the defendant culminating in the plaintiff's discharge. *Rabidue*, 584 F.Supp. at 424. A review of the record disclosed that the trial court's findings, namely that the company's predischarge actions toward the plaintiff did not evince an anti-female animus, were not clearly erroneous. Consequently, the trial court's conclusion that the plaintiff failed to establish violations of Title VII or the Elliott Larsen Act in this regard is AFFIRMED.

In addressing the plaintiff's discriminatory discharge claim, the trial court noted that the plaintiff's allegations paralleled classic disparate treatment charges addressed by § 703(a)(1) of Title VII and articulated the classic assertions that she was discharged because she was a female. Subsequent to applying the criteria and procedure mandated by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), the trial court concluded that the plaintiff had failed to satisfy her burden of proof to support her contention that the defendant's advanced legitimate, nondiscriminatory reasons for her termination were pretextual and consequently had failed to sustain a disparate treatment claim that resulted from her discharge under either Title VII or the Elliott Larsen Act. *Rabidue*, 584 F.Supp. at 426-27. The lower court's determination that the plaintiff's discharge was not the result of gender-based discrimination was a factual finding subject to the clearly erroneous standard of review. *Pullman-Standard v. Swint*, 456 U.S. 273, 287-88, 102 S.Ct. 1781, 1789, 72

L.Ed.2d 66 (1982); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 374 (6th Cir. 1984). This court, having scrutinized the record, is of the opinion that the findings of fact and conclusions of law articulated in the trial court's cogent reasoning are not clearly erroneous and are accordingly AFFIRMED.[3]

The plaintiff's claim of sexual harassment derives from Title VII's proscription that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his . . . terms, conditions or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C § 2000e-2(a)(1) (§ 703(a)(1) of Title VII). The case law in this area has recognized two basic variants of sexual harassment: "harassment that creates an offensive environment ('condition of work') and harassment in which a

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[3]The dissent has cited evidence developed exclusively by the plaintiff without noting the wide disparity between the plaintiff's evidence when compared to the totality of the record as it bears upon her charges of disparate treatment, sexually hostile work environment, and discriminatory discharge. With particularity, the dissent has alluded to Henry's vulgarity and obscene characterizations as well as purported acts of disparate treatment and gender-based discrimination which, the trial record affirmatively disclosed, occurred while Osceola operated as an independent company or during its ownership by United Refineries—all before the Texas-American acquisition. Apart from the foregoing transcript disclosures, the plaintiff's probative evidence, at best, was vague and obscure in failing to reflect a continuation of those actions after the Texas-American acquisition or the extent and circumstances of that alleged discriminatory conduct and sexual harassment, if it did in fact persist, that purportedly implicated Texas-American. Moreover, where, as here, the evidence was in conflict, credibility issues come within the discretion of the district court for resolution. In the instant case, the district court clearly assigned greater credibility and weight to the defendant's witnesses and its testimony than to the plaintiff and her witnesses as is evidenced by its opinion. This court, having reviewed the district court's interpretation of the evidence and its assignments of credibility pursuant to the clearly erroneous standard, cannot conclude that the trial court's interpretation of the evidence was clearly erroneous.

supervisor demands sexual consideration in exchange for job benefits ('*quid pro quo*')." *Henson v. City of Dundee*, 682 F.2d 897, 908 (11th Cir. 1982) (citing C. MacKinnon, Sexual Harassment of Working Women 32-47 (1979)). *See Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399, 2405 (1986); *Downes v. Federal Aviation Administration*, 775 F.2d 288, 290-91 (Fed. Cir. 1985); *Katz v. Dole*, 709 F.2d 251, 254 (4th Cir. 1983). *See also* 1 Larson, Employment Discrimination § 41.64(c) (1985); K. McCulloch, Termination of Employment ¶ 10,103 (P-H 1984); Comment, Sexual Harassment Claims of Abusive Work Environment under Title VII, 97 Harv.L.Rev. 1449, 1454-55 (1984); Annot., 46 A.L.R. Fed. 224 (1980 & Supp. 1985).

This circuit has entertained cases involving a spectrum of sexual harassment issues; however, it has not directly addressed a claim asserting a violation of Title VII based upon an alleged sexually discriminatory work environment which had not resulted in a tangible job detriment as joined by the issues of the plaintiff's charges herein. *See, e.g., Easter v. Jeep Corp.*, 750 F.2d 520 (6th Cir. 1984); *EEOC v. Maxwell Co.*, 726 F.2d 282 (6th Cir. 1984); *Held v. Gulf Oil Co.*, 684 F.2d 427 (6th Cir. 1982). Although the *quid pro quo* category of sexual harassment appears to have given rise to the greatest proliferation of case law to date, other circuits have recognized that an offensive work environment could, under appropriate circumstances, constitute Title VII sexual harassment without the necessity of asserting or proving tangible job detriment by the harassed employee, which proof underlies the *quid pro quo* variant of sexual harassment. *See Henson*, 682 F.2d at 902; *Bundy v. Jackson*, 641 F.2d 934, 943-44 (D.C. Cir. 1981). Moreover, the Supreme Court has recently permitted a plaintiff to pursue a Title VII cause of action arising as a result of discrimination based upon sexually hostile or abusive work environment. *Meritor Savings Bank v. Vinson*, 106 S.Ct. 2399, 2404-06 (1986).

In addressing the issues presented by such a sexual harass-

ment charge, this court's attention is initially directed to the guidelines issued by the Equal Employment Opportunity Commission (EEOC) as an informed source of instruction to assist its efforts to probe the parameters of Title VII sexual harassment.[4] Those guidelines define sexual harassment in the following terms:

> " (a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (footnote omitted).

After having considered the EEOC guidelines and after having canvassed existing legal precedent that has discussed the issue, this court concludes that a plaintiff, to prevail in a Title VII offensive work environment sexual harassment action, must assert and prove that: (1) the employee was a member of a protected class; (2) the employee was subjected to unwelcomed sexual harassment in the form of sexual

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[4]The EEOC guidelines are intra-agency suggested interpretive regulations that are not binding upon courts, *see Vinson*, 106 S.Ct. at 2405; *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-45, 97 S.Ct. 401, 410-12, 50 L.Ed.2d 343 (1976); however, a number of courts have accorded them favorable consideration in resolving issues of charged sexual harassment, *see Vinson*, 106 S.Ct. at 2405; *Downes*, 775 F.2d at 291; *Henson*, 682 F.2d at 903; *Bundy*, 641 F.2d at 947.

advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile, or offensive working environment that affected seriously the psychological well-being of the plaintiff; and (5) the existence of respondeat superior liability. *See Vinson*, 106 S.Ct. at 2404-06; *Downes*, 775 F.2d at 292-95; *Katz*, 709 F.2d at 254; *Henson*, 682 F.2d at 903-05. *Cf. Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1253-59 (6th Cir. 1985) (racial hostile work environment claim); *Torres v. County of Oakland*, 758 F.2d 147, 152 (6th Cir. 1985) (national origin hostile work environment claim).

Thus, to prove a claim of abusive work environment premised upon sexual harassment, a plaintiff must demonstrate that she would not have been the object of harassment but for her sex. *Henson*, 682 F.2d at 904 (citations omitted). It is of significance to note that instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII sexual harassment charge because both men and women were accorded like treatment. *Id.* (citing, *inter alia*, *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977); *Bradford v. Sloan Paper Co.*, 383 F.Supp. 1157, 1161 (N.D. Ala. 1974); Note, Sexual Harassment and Title VII, 76 U.Mich.L.Rev. 1007, 1020-21 & n.99, 1033 & n.178 (1978); Comment, Sexual Harassment and Title VII, 51 N.Y.U.L.Rev. 148, 151-52 (1976)).

Unlike *quid pro quo* sexual harassment which may evolve from a single incident, sexually hostile or intimidating environments are characterized by multiple and varied combinations and frequencies of offensive exposures, which characteristics would dictate an order of proof that placed the burden upon the plaintiff to demonstrate that injury resulted not from a single or isolated offensive incident, comment, or conduct, but from incidents, comments, or conduct that

occurred with some frequency. To accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case, the trier of fact, when judging the totality of the circumstances impacting upon the asserted abusive and hostile environment placed in issue by the plaintiff's charges, must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances. Thus, in the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges of sexual harassment anchored in an alleged hostile and/or abusive work environment regardless of whether the plaintiff was actually offended by the defendant's conduct. Assuming that the plaintiff has successfully satisfied the burden of proving that the defendant's conduct would have interfered with a reasonable individual's work performance and would have affected seriously the psychological well-being of a reasonable employee, the particular plaintiff would nevertheless also be required to demonstrate that she was actually offended by the defendant's conduct and that she suffered some degree of injury as a result of the abusive and hostile work environment.

Accordingly, a proper assessment or evaluation of an employment environment that gives rise to a sexual harassment claim would invite consideration of such objective and subjective factors as the nature of the alleged harassment, the background and experience of the plaintiff, her coworkers, and supervisors, the totality of the physical environment of the plaintiff's work area, the lexicon of obscenity that pervaded the environment of the workplace both before and after the plaintiff's introduction into its environs, coupled with the reasonable expectation of the plaintiff upon voluntarily entering that environment. Thus, the presence of actionable sexual harassment would be different depending upon the personality of the plaintiff and the prevailing work

environment and must be considered and evaluated upon an ad hoc basis. As Judge Newblatt aptly stated in his opinion in the district court:

> Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But it is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers. Clearly, the Court's qualification is necessary to enable 29 C.F.R. § 1604.11(a)(3) to function as a workable judicial standard.

Rabidue, 584 F.Supp. at 430.[5]

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[5] Such an approach is not inconsistent with the EEOC guidelines, which emphasize the individualized nature of a probative inquiry:

> (b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

29 C.F.R. § 1604.11(b).

The dissent's focus on certain of the above factors in isolation is misplaced. The district court possesses broad discretion as to the evidence to be considered in evaluating the totality of the circumstances and the context of the alleged incidents. This court has merely attempted to identify in general terms some criteria that may potentially enter into a case-by-case examination of the totality of the evidence in such a case, without inferring the weight to be accorded in the first instance by the district court to any particular factor.

To prevail in an action that asserts a charge of offensive work environment sexual harassment, the ultimate burden of proof is upon the plaintiff to additionally demonstrate respondeat superior liability by proving that the employer, through its agents or supervisory personnel, knew or should have known of the charged sexual harassment and failed to implement prompt and appropriate corrective action. *See Barrett v. Omaha National Bank*, 726 F.2d 424, 427-28 (8th Cir. 1984); *Katz v. Dole*, 709 F.2d 251, 255-56 (4th Cir. 1983); *Henson*, 682 F.2d 905, 910 n.20. *Cf. Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1254 (6th Cir. 1985) (racial hostile working environment). *See generally* 1 Larson, Employment Discrimination § 41.65 (1985). The promptness and adequacy of the employer's response to correct instances of alleged sexual harassment is of significance in assessing a sexually hostile environment claim and the employer's reactions must be evaluated upon a case by case basis. *See, e.g., Barrett*, 726 F.2d at 427.[6]

In considering an order of proof to implement the resolution of Title VII sexually hostile working environment controversies, this court has reviewed the procedure enunciated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Com-*

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[6] Although the Supreme Court in *Vinson* declined to issue a definitive rule on employer liability arising from the acts of supervisory personnel in sexually hostile environment cases, it stated that Congress intended the courts to look to common law principles of agency for guidance in this area. 106 S.Ct. at 2408.

This court emphasizes that the instant case does not involve alleged acts of sexual harassment by a supervisor. Henry exercised no supervisory authority over the plaintiff nor the plaintiff over him, but rather the two parties were peers at Osceola and at all times pertinent hereto. Accordingly, the majority opinion, like the *Vinson* Court, expresses no view as to the scope of respondeat superior liability in the context of a charge of a sexually hostile working environment where alleged acts of harassment by a plaintiff's supervisor are at issue and not, as here, the alleged acts of a peer in the workplace.

munity Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), and has concluded that the order of proof and procedures enunciated therein are not readily adaptable to developing the proofs and defenses in this type of Title VII action. It would appear that the most effective and efficient procedural format would implement the traditional practice of placing the ultimate burden of proof by a preponderance of the evidence upon the claimant followed by a proffer of defense and an opportunity for a plaintiff's rebuttal.

A review of the Title VII sexual harassment issue in the matter *sub judice* prompts this court to conclude that the plaintiff neither asserted nor proved a claim of "sexual advances," "sexual favors," or "physical conduct," or sexual harassment implicating subparts (a)(1) or (a)(2) of the EEOC definition, more specifically, those elements typically at issue in a case of *quid pro quo* sexual harassment. Thus, the plaintiff to have prevailed in her cause of action against the defendant on this record must have proved that she had been subjected to unwelcomed verbal conduct and poster displays of a sexual nature which had unreasonably interfered with her work performance and created an intimidating, hostile, or offensive working environment that affected seriously her psychological well-being.

In the case at bar, the record effectively disclosed that Henry's obscenities, although annoying, were not so startling as to have affected seriously the psyches of the plaintiff or other female employees. The evidence did not demonstrate that this single employee's vulgarity substantially affected the totality of the workplace. The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places. In sum, Henry's vulgar language, coupled with the

sexually oriented posters, did not result in a working environment that could be considered intimidating, hostile, or offensive under 29 C.F.R. § 1604.11(a)(3) as elaborated upon by this court.[7] The district court's factual findings supporting its conclusion to this effect were not clearly erroneous. It necessarily follows that the plaintiff failed to sustain her burden of proof that she was the victim of a Title VII sexual harassment violation.[8] Accordingly, the trial court's disposition of this issue is AFFIRMED.

The relevant Elliott Larsen Act sexual harassment provision attendant to this action arises from Mich. Comp. Laws Ann. § 37.2103(h)(iii), which reads as follows:

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[7] The precedential cases addressing a sexually hostile and abusive environment within the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and 29 C.F.R. § 1604.11(a)(3) have all developed more compelling circumstances than are presented herein. In *Bundy*, both the plaintiff's co-employees and supervisors harassed her with conduct that included continual personal and telephonic sexual propositions both at work and at her home and the plaintiff's complaints inspired her supervisor to also proposition her. 641 F.2d at 939-40. In *Henson*, the plaintiff was subjected to numerous harangues and demeaning inquiries into her sexual proclivities, vulgarities, and repeated requests for sexual relations from her supervisor, the police chief. 682 F.2d at 899-901. In *Katz*, several supervisory personnel and co-workers bombarded the plaintiff with sexual slurs, insults, innuendo, and propositions, the plaintiff's complaints to her supervisor generated further harassment from him, and the plaintiff's supervisor admitted having heard co-workers direct obscenities to the plaintiff. 709 F.2d at 253-54. In the case at bar, the charges of sexually hostile and abusive environment were limited to pictorial calendar type office wall displays of semi-nude and nude females and Henry's off-color language. Unlike the facts of *Bundy*, *Henson*, and *Katz*, this case involved no sexual propositions, offensive touchings, or sexual conduct of a similar nature that was systematically directed to the plaintiff over a protracted period of time.

[8] As noted in the trial court's opinion, the successorship defense would have precluded preacquisition liability even if the sexual harassment ruling had not been in favor of the defendant. *Rabidue*, 584 F.Supp. at 433. However, this court's disposition of the sexual harassment charges renders the successorship argument a redundant defense.

> (h) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when . . . (iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment . . . or creating an intimidating, hostile, or offensive employment . . . environment.

Here again it is obvious that the text of the above subsection was closely modeled after 29 C.F.R. § 1604.11(a)(3). The only apparent difference between the two provisions is that the EEOC guidelines incorporate the phrase "unreasonably interfering" rather than the Elliott Larsen Act's phrase "substantially interfering." Thus, for the reasons hereinbefore articulated in the comparative analysis of Title VII with the Elliott Larsen Act, the plaintiff's exposure to Henry's obscene language and the sexually oriented posters did not rise to a level substantially interfering with the plaintiff's work performance that created an intimidating, hostile, or offensive work environment which affected seriously her psychological well-being in violation of the Elliott Larsen Act and the district court's conclusion in this respect is therefore AFFIRMED.

In addressing the Equal Pay Act violation asserted by the plaintiff, this court also finds itself in agreement with the district court's decision that the plaintiff failed to meet her burden of proof to establish a prima facie case under the Act by demonstrating that she performed a job that required substantially equal skill, effort, and responsibility, but that she received less than equal pay. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 195, 94 S.Ct. 2223, 2228, 41 L.Ed.2d 1 (1974); *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1029 (6th Cir. 1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1282, 79 L.Ed.2d 685 (1984); *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981). *See generally* 1 Larson, Employment Discrimination § 29.60 (1985). The plaintiff's testimony con-

cerning her perception of the distribution of isolated fringe benefits simply did not rise to the level of a prima facie case.[9] The district court's disposition of the plaintiff's Equal Pay Act claim is AFFIRMED.

Finally, the record having failed to develop probative evidence of retaliatory conduct by the defendant Texas-American, the plaintiff's inartfully pleaded cause of action arising thereunder is accordingly dismissed. *See Jackson v. Pepsi-Cola, Dr. Pepper Bottling Co.*, 783 F.2d 50, 54 (6th Cir. 1986).[10]

For the reasons stated herein, the plaintiff having failed to sustain any of the claims which she has asserted, the judgment of the district court in favor of defendant is hereby AFFIRMED.

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[9] The Equal Pay Act, part of the Fair Labor Standards Act, prohibits differences in pay on the basis of sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions," subject to certain specified exceptions. *See* 29 U.S.C. § 206(d)(1).

[10] This court notes that the plaintiff did not allege any claim of retaliatory conduct in her complaint arising under the "opposition clause" of Title VII, 42 U.S.C. § 2000e-3(a), on which she later expressly relied on appeal in suggesting that she had proved a case of retaliatory conduct, nor did she in fact in her complaint allege the underlying facts upon which she later relied on appeal, nor does the record support the fact that she pressed retaliatory conduct as an independent claim distinct from her generalized Title VII pleaded allegations, and the district court did not address the issue as a distinct claim in its opinion.

KEITH, Circuit Judge, concurring in part, dissenting in part. I concur in the portion of the majority opinion which finds no successor liability. However, as I believe the majority erroneously resolves plaintiff's substantive claims, I dissent.

I dissent for several reasons. First, after review of the entire record I am firmly convinced, that although supporting evidence exists, the court is mistaken in affirming the findings that defendant's treatment of plaintiff evinced no anti-female animus and that gender-based discrimination played no role in her discharge. The overall circumstances of plaintiff's workplace evince an anti-female environment. For seven years plaintiff worked at Osceola as the sole woman in a salaried management position. In common work areas plaintiff and other female employees were exposed daily to displays of nude or partially clad women belonging to a number of male employees at Osceola. One poster, which remained on the wall for eight years, showed a prone woman who had a golf ball on her breasts with a man standing over her, golf club in hand, yelling "Fore." And one desk plaque declared "Even male chauvanist pigs need love." Plaintiff testified the posters offended her and her female co-workers.

In addition, Computer Division Supervisor Doug Henry regularly spewed anti-female obscenity. Henry routinely referred to women as "whores," "cunt", "pussy" and "tits." *See Rabidue v. Osceola*, 584 F. Supp. 419, 423 (E.D. Mich. 1984). Of plaintiff, Henry specifically remarked "All that bitch needs is a good lay" and called her "fat ass." Plaintiff arranged at least one meeting of female employees to discuss Henry and repeatedly filed written complaints on behalf of herself and other female employees who feared losing their jobs if they complained directly. Osceola Vice President Charles Muetzel stated he knew that employees were "greatly disturbed" by Henry's language. However, because Osceola needed Henry's computer expertise, Muetzel did not reprimand or fire Henry. In response to subsequent complaints about Henry, a later supervisor, Charles Shoemaker, testified

that he gave Henry "a little fatherly advice" about Henry's prospects if he learned to become "an executive type person."

In addition to tolerating this anti-female behavior, defendant excluded plaintiff, the sole female in management, from activities she needed to perform her duties and progress in her career. Plaintiff testified that unlike male salaried employees, she did not receive free lunches, free gasoline, a telephone credit card or entertainment privileges. Nor was she invited to the weekly golf matches. Without addressing defendant's disparate treatment of plaintiff, the district court dismissed these perks and business activities as fringe benefits. After plaintiff became credit manager defendant prevented plaintiff from visiting or taking customers to lunch as all previous male credit managers had done. Plaintiff testified that upon requesting such privileges, her supervisor, Mr. Muetzel, replied that it would be improper for a woman to take male customers to lunch and that she "might have car trouble on the road." Plaintiff reported that on another occasion, Muetzel asked her "how would it look for me, a married man, to take you, a divorced woman, to the West Branch Country Club in such a small town?" However, defendant apparently saw no problem in male managers entertaining female clients regardless of marital status. Plaintiff's subsequent supervisor, Charles Shoemaker, stated to another female worker, Joyce Solo, that "Vivienne (plaintiff) is doing a good job as credit manager, but we really need a man on that job," adding "She can't take customers out to lunch." Aside from this Catch-22, Mr. Shoemaker also remarked plaintiff was not forceful enough to collect slow-paying jobs. How plaintiff can be so abrasive and aggressive as to require firing but too timid to collect delinquent accounts is, in my view, an enigma.

My review of the record also shows plaintiff was consistently accorded secondary status. Plaintiff recounted that at a meeting convened to instruct clerical employees on their duties after the United States Refineries takeover, plaintiff was seated with female hourly employees. The male salaried

employees, apparently pre-informed of the post-takeover procedures, stood at the front of the room. Plaintiff confronted Muetzel to express surprise at being addressed as a clerical employee and to ask what her post-takeover role would entail. Muetzel responded plaintiff would have whatever role was handed to her. At the suggestion of her former boss, Mr. Hansen, plaintiff wrote a memo summarizing her qualifications and pleading for non-sex based consideration for post-takeover positions. She received no response to this memo.

In contrast to the supervisors' reluctance to address Henry's outrageous behavior, plaintiff was frequently told to tone down and discouraged from executing procedures she felt were needed to correct waste and improve efficiency as her job required. Not only did plaintiff receive minimal support, but she was repeatedly undermined. For example, supervisor Doug Henry once directed his employees to ignore plaintiff's procedures for logging time and invoices, a particularly damaging directive given plaintiff's responsibility of coordinating the work of Henry's computer staff. In another example, plaintiff returned from her vacation to find that none of the check depositing procedures agreed upon had been implemented and that some of her duties had been permanently transferred to the male who filled in during her vacation. In contrast to the fatherly advice and the praise for potential which Henry received, plaintiff was informed she had set her goals too high. After dismissal, but prior to final notice, plaintiff received instructions not to return to the refinery. In contrast, male employees fired for embezzlement were allowed to return to clean out their desks. Upon dismissal, plaintiff reported that Shoemaker advised her to get a secretarial job.

The record establishes plaintiff possessed negative personal traits. These traits did not, however, justify the sex-based disparate treatment recounted above. Whatever undesirable behavior plaintiff exhibited, it was clearly no worse than

Henry's. I conclude the misogynous language and decorative displays tolerated at the refinery (which even the district court found constituted a "fairly significant" part of the job environment), the primitive views of working women expressed by Osceola supervisors and defendant's treatment of plaintiff as the only female salaried employee clearly evince anti-female animus.

Second, I dissent because I am unable to accept key elements of the standard for sexual harassment set forth in the majority opinion. Specifically, I would not impose on the plaintiff alleging hostile environment harassment an additional burden of proving respondeat superior liability where a supervisor is responsible for the harm. In *Meritor Savings Bank v. Vinson*, 54 U.S.L.W. 4703 (June 19, 1986), the Supreme Court instructed courts to determine employer liability according to agency principles. *Id.* at 4707. Agency principles establish that an employer is normally liable for the acts of its supervisors and agents. *Id.* Because a supervisor is "clothed with the employer's authority" and is responsible for the "day-to-day supervision of the work environment and with ensuring a safe, productive workplace," his abusive behavior in violation of that duty should be imputed to the employer just as with any other supervisory action which violates Title VII. *Id.* at 4709 (J. Marshall concurring, joined by JJ. Brennan, Blackmun and Stevens). The creation of a discriminatory work environment by a supervisor can only be achieved through the power accorded him by the employer. I see insufficient reason to add an element of proof not imposed on any other discrimination victim, particularly where agency principles and the "goals of Title VII law" preclude the imposition of automatic liability in all circumstances. *Id.* As Justice Marshall concludes:

> There is therefore no justification for a special rule, to be applied only in "hostile environment" cases, that sexual harassment does not create employer liability until the employee suffering the discrimina-

> tion notifies other supervisors. No such requirement appears in the statute, and no such requirement can coherently be drawn from the law of agency. . . .
>
> I would apply in this case the same rules we apply in all other Title VII cases, and hold that sexual harassment by a supervisor of an employee under his supervison, leading to a discriminatory work environment, should be imputed to the employer for Title VII purposes regardless of whether the employee gave "notice" of the offense.

Id.

In cases of hostile work environment harassment by co-workers, I would follow guidelines set forth by the Equal Employment Opportunity Commission:

> With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

29 C.F.R. §§ 1604.11(d) (1985).

Nor do I agree with the majority holding that a court considering hostile environment claims should adopt the perspective of the reasonable person's reaction to a similar environment. Slip op. at 12. In my view, the reasonable person perspective fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men. *See* Comment, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1451 (1984). As suggested by the Comment, I would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant. *Id.* at 1459. Moreover, unless the outlook of the

reasonable woman is adopted, the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders, in this case, men. *Id.*

Which brings me to the majority's mandate to consider the "prevailing work environment," "the lexicon of obscenity that pervaded the environment both before and after plaintiff's introduction into its environs," and plaintiff's reasonable expectations upon "voluntarily" entering that environment. Slip op. at 14. The majority suggests through these factors that a woman assumes the risk of working in an abusive, anti-female environment. Moreover, the majority contends that such work environments somehow have an innate right to perpetuation and are not to be addressed under Title VII:

> Indeed, it cannot seriously be disputed that in some work environments, humor and language are rough hewn and vulgar. Sexual jokes, sexual conversations and girlie magazines may abound. Title VII was not meant to—or can—change this. It must never be forgotten that Title VII is the federal court mainstay in the struggle for equal employment opportunity for the female workers of America. But is quite different to claim that Title VII was designed to bring about a magical transformation in the social mores of American workers. Clearly, the Court's qualification is necessary to enable 29 C.F.R. § 1604.11(a)(3) to function as a workable judicial standard.

Slip op. at 15 (quoting the district court opinion, *Osceola v. Rabidue*, 584 F.Supp. at 430.)

In my view, Title VII's precise purpose is to prevent such behavior and attitudes from poisoning the work environment of classes protected under the Act. To condone the majority's notion of the "prevailing workplace" I would also have to agree that if an employer maintains an anti-semitic workforce

and tolerates a workplace in which "kike" jokes, displays of nazi literature and anti-Jewish conversation "may abound," a Jewish employee assumes the risk of working there, and a court must consider such a work environment as "prevailing." I cannot. As I see it, job relatedness is the only additional factor which legitimately bears on the inquiry of plaintiff's reasonableness in finding her work environment offensive. In other words, the only additional question I would find relevant is whether the behavior complained of is required to perform the work. For example, depending on their job descriptions, employees of soft pornography publishers or other sex-related industries should reasonably expect exposure to nudity, sexually explicit language or even simulated sex as inherent aspects of working in that field. However, when that exposure goes beyond what is required professionally, even sex industry employees are protected under the Act from non-job related sexual demands, language or other offensive behavior by supervisors or co-workers. As I believe no woman should be subjected to an environment where her sexual dignity and reasonable sensibilities are visually, verbally or physically assaulted as a matter of prevailing male prerogative, I dissent.

The majority would also have courts consider the background of plaintiff's co-workers and supervisors in assessing the presence of actionable work environment sex harassment. The only reason to inquire into the backgrounds of the defendants or other co-workers is to determine if the behavior tolerated toward female employees is reasonable in light of those backgrounds. As I see it, these subjective factors create an unworkable standard by requiring the courts to balance a morasss of perspectives. But more importantly, the background of the defendants or other workers is irrelevant. No court analyzes the background and experience of a supervisor who refuses to promote black employees before finding actionable race discrimination under Title VII. An equally disturbing implication of considering defendants' backgrounds is the notion that workplaces with the least sophisti-

cated employees are the most prone to anti-female environments. Assuming *arguendo** this notion is true, by applying the prevailing workplace factor, this court locks the vast majority of working women into workplaces which tolerate anti-female behavior. I conclude that for actionable offensive environment claims, the relevant inquiry is whether the conduct complained of is offensive to the reasonable woman. Either the environment affects her ability to perform or it does not. The backgrounds and experience of the defendant's supervisors and employees is irrelevant.

Nor can I agree with the majority's notion that the effect of pin-up posters and misogynous language in the workplace can have only a minimal effect on female employees and should not be deemed hostile or offensive "when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at newsstands, on prime-time television, at the cinema and in other public places." Slip op. at 17. "Society" in this scenario must primarily refer to the unenlightened; I hardly believe reasonable women condone the pervasive degradation and exploitation of female sexuality perpetuated in American culture. In fact, pervasive societal approval thereof and of other stereotypes stiffles female potential and instills the debased sense of self worth which accompanies stigmatization. The presence of pin-ups and misogynous language in the workplace can only evoke and confirm the debilitating norms by which women are primarily and contemptuously valued as objects of male sexual fantasy. That some men would condone and wish to perpetuate such behavior is not surprising. However, the relevant inquiry at hand is what the reasonable woman would find offensive, not society, which at one point also condoned slavery. I conclude that

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*I do not assert any correlation exists between the level of social sophistication present in a work environment and anti-female behavior.

sexual posters and anti-female language can seriously affect the psychological well being of the reasonable woman and interfere with her ability to perform her job.

Finally, I find probative evidence supports plaintiff's retaliation claim. Plaintiff presented substantial evidence that her supervisor Charles Shoemaker withheld her unemployment benefits because she filed a sex discrimination complaint. Joyce Solo, a co-worker, testified that right after plaintiff was fired and filed charges, Shoemaker stated he "would have let [plaintiff] have her unemployment, except she filed sex discrimination charges and it made me mad so I charged her with misconduct." Another employee also testified that Shoemaker instructed Osceola employees to write up negative encounters with plaintiff or they might have to have her return to work. Thus, plaintiff presented evidence showing Shoemaker accorded her adverse treatment because she filed a sex discrimination charge. This is a prima facie case of retaliation which should have been addressed by the district court and not dismissed by this court as an "inartfully pleaded" cause of action.

In conclusion, I dissent because the record shows that defendant's treatment of plaintiff evinces anti-female animus and that plaintiff's gender played a role in her dismissal. I also believe the hostile environment standard set forth in the majority opinion shields and condones behavior Title VII would have the courts redress. Finally, in my view, the standard fails to encourage employers to set up internal complaint procedures or otherwise seriously address the problem of sexual harassment in the workplace.